DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1493
Title: Bruce James Abramski, Jr., Petitioner
v.
United States
Docketed: June 25, 2013
Linked with 12A955
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (11-4992)
Decision Date: January 23, 2013
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 2 2013	Application (12A955) to extend the time to file a petition for a writ of certiorari from April 23, 2013 to June 22, 2013, submitted to The Chief Justice.
Apr 4 2013	Application (12A955) granted by The Chief Justice extending the time to file until June 21, 2013.
Jun 21 2013	Petition for a writ of certiorari filed. (Response due July 25, 2013)
Jul 19 2013	Order extending time to file response to petition to and including August 26, 2013.
Jul 25 2013	Brief amici curiae of Steve Stockman, et al. filed.
Jul 25 2013	Brief amicus curiae of NRA Civil Rights Defense Fund filed.
Aug 26 2013	Brief of respondent United States in opposition filed.
Sep 9 2013	Reply of petitioner Bruce James Abramski, Jr. filed.
Sep 11 2013	DISTRIBUTED for Conference of September 30, 2013.
Oct 7 2013	DISTRIBUTED for Conference of October 11, 2013.
Oct 15 2013	Petition GRANTED.
Oct 24 2013	Petitioner will file the joint appendix and petitioner's brief on the merits on or before November 26, 2013.
Oct 24 2013	Respondent will file respondent's brief on the merits on or before December 24, 2013.
Nov 4 2013	SET FOR ARGUMENT ON Wednesday, January 22, 2014.
Nov 4 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 14 2013	Record received from U.S.D.C. Western District of Virginia. The record is electronic (Not on PACER).
Nov 18 2013	Record received from the U. S. C. A. Fourth Circuit - (1 envelope). A portion of the record is electronic (Not on PACER). There are also sealed documents in

	this record.
Nov 26 2013	Joint appendix (2 volumes) filed. (Statement of costs filed.)
Nov 26 2013	Brief of petitioner Bruce James Abramski, Jr. filed.
Dec 3 2013	Brief amicus curiae of Steve Stockman, et al. filed.
Dec 3 2013	Brief amicus curiae of NRA Civil Rights Defense Fund filed. (Distributed)
Dec 3 2013	Brief amici curiae of Robert Snellings and Ulysses Grant Early, IV filed. (Distributed)
Dec 3 2013	Brief amici curiae of State of West Virginia, et al. filed. (Distributed)
Dec 4 2013	CIRCULATED.
Dec 23 2013	Brief of respondent United States filed. (Distributed)
Dec 30 2013	Brief amici curiae of States of Hawaii, et al. filed. (Distributed)
Dec 30 2013	Brief amici curiae of Brady Center to Prevent Gun Violence, et al. filed. (Distributed)
Dec 30 2013	Brief amicus curiae of City of New York filed. (Distributed)
Jan 13 2014	Reply of petitioner Bruce James Abramski, Jr. filed. (Distributed)
Jan 22 2014	Argued. For petitioner: Richard D. Dietz, Winston Salem, N. C. For respondent: Joseph R. Palmore, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

No. 12-1498

Supreme Court, U.S.
FILED
JUN 21 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When a person buys a gun intending to later sell it to someone else, the government often prosecutes the initial buyer under 18 U.S.C. § 922(a)(6) for making a false statement about the identity of the buyer that is "material to the lawfulness of the sale." These prosecutions rely on the court-created "straw purchaser" doctrine, a legal fiction that treats the ultimate recipient of a firearm as the "actual buyer," and the immediate purchaser as a mere "straw man."

The lower courts uniformly agree that a buyer's intent to resell a gun to someone who cannot lawfully buy it is a fact "material to the lawfulness of the sale." But the Fourth, Sixth, and Eleventh Circuits have split with the Fifth and Ninth Circuits about whether the same is true when the ultimate recipient *can* lawfully buy a gun. The questions presented are:

1. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a fact "material to the lawfulness of the sale" of the firearm under 18 U.S.C. § 922(a)(6)?

2. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a piece of information "required . . . to be kept" by a federally licensed firearm dealer under § 924(a)(1)(A).

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INTRODUCTION

This case presents a straightforward, five-circuit split on a significant legal issue involving the federal firearm laws.

Petitioner Bruce Abramski, a former police officer, bought a gun for his uncle. Abramski's uncle is a law-abiding citizen legally entitled to buy a gun himself. But because Abramski worked in law enforcement, he receives a discount at many gun stores. So Abramski bought the gun to save his uncle some money, then drove to his uncle's hometown, met his uncle at a nearby gun store, and signed the necessary ATF paperwork to transfer ownership.

When Abramski bought the gun initially, he checked a box on an ATF form indicating that he was the "actual buyer." However, the instructions on the form indicate that a person who buys a gun intending to later transfer it to someone else is not an "actual buyer."

After discovering that Abramski bought the gun for his uncle but had checked the "actual buyer" box on the ATF form, the government indicted him for making a false statement that is "intended or likely to deceive" a licensed gun dealer "with respect to any fact material to the lawfulness of the sale." 18 U.S.C. § 922(a)(6). The government relied on the "straw purchaser" doctrine, a court-created legal fiction that treats the ultimate recipient of a firearm as the true purchaser.

Before trial, Abramski moved to dismiss the indictment, asserting that the straw purchaser doctrine only applies when the ultimate recipient of the firearm

is not eligible to buy or possess a gun. Thus, because Abramski's uncle was legally entitled to buy and own a gun himself, federal law did not prohibit a gun dealer from selling the gun to Abramski even if the dealer knew Abramski later planned to resell it to his uncle. As a result, Abramski's answer to the "actual buyer" question was not "material to the lawfulness of the sale."

Had Abramski been prosecuted in a court in the Fifth or Ninth Circuits, he would not have been convicted. As the Fifth Circuit has explained "§ 922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the 'lawfulness of the sale' of firearms. . . . Thus, if the true purchaser can lawfully purchase a firearm directly, § 922(a)(6) liability (under a 'straw purchase' theory) does not attach." *United States v. Polk*, 118 F.3d 286, 295 (5th Cir. 1997).

But in this case, the Fourth Circuit joined the Sixth and Eleventh Circuits in expressly rejecting that reasoning and holding that *"[t]he identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under § 922(a)(6)."* App. 15a-16a (emphasis in original).

As explained below, the Fifth and Ninth Circuits' reasoning is correct. But regardless of which interpretation is the correct one, this Court's review is warranted. The circuit split on this significant legal issue is deep and persistent. The lack of national uniformity is particularly troubling because the government processes an average of more than 45,000 gun applications every day. *See* Fed. Bureau of Invest. National Instant Criminal Background

Check System (NICS) Operations Report 2011 at 8, *available at* http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011.

In addition, recent tragedies involving gun violence have put tremendous pressure on federal officials to enforce existing gun laws. That pressure makes prosecutors less willing to exercise their discretion to avoid the injustice that can result when conduct that is perfectly lawful in one state is a federal felony just a few states away. The Court should grant review to resolve this glaring discord among the circuits.

OPINIONS BELOW

The Fourth Circuit's decision below is reported at 706 F.3d 307 and reprinted in the Appendix (App.) at 1a-24a. The District Court ruled on Petitioner's March 10, 2011 motion to dismiss orally from the bench. The transcript excerpt containing that ruling is reprinted at App. 25a-27a. The District Court's judgment is unreported and reprinted at App. 28a-41a.

JURISDICTION

The Fourth Circuit rendered its decision on January 23, 2013. App. 1a. On April 4, 2013, the Chief Justice extended the time to file a petition for a writ of certiorari to June 21, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

18 U.S.C. § 922(a)(6) provides:

> (a) It shall be unlawful . . . (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C. § 924(a)(1)(A) provides:

> (a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter . . . shall be fined under this title, imprisoned not more than five years, or both.

STATEMENT

In the Fall of 2009, Petitioner Bruce Abramski's elderly uncle decided he wanted a gun to protect himself inside his home. He went to Abramski for advice because Abramski was a former police officer and had experience with firearms. Abramski told his uncle that he received a law enforcement discount at gun stores and offered to buy the gun for his uncle to save him some money. App. 3a; J.A. 548-559.[1]

Abramski's uncle then spoke to three different licensed gun dealers near his home to determine whether Abramski could buy the gun for him. All three gun dealers told Abramski's uncle that what he and Abramski proposed was perfectly legal—Abramski would simply need to buy the gun in his hometown in Virginia, fill out the necessary ATF forms, undergo the necessary background check, and then transfer ownership of the gun to Abramski's uncle at a licensed dealer near his uncle's home in Pennsylvania, where Abramski's uncle could fill out the necessary paperwork and undergo his own background check. App. 3a; J.A. 558.

After determining that the gun transfer would be legal, Abramski's uncle sent him a check to cover the cost of the gun. Abramski then went to a local gun store and bought the gun. As part of the necessary paperwork and background check, Abramski filled out ATF Form 4473. Among the questions on the form is Question 11a, which states as follows:

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1. Citations to "J.A." are to the joint appendix filed below, which is available electronically in the Fourth Circuit's PACER docket for this appeal.

> Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.**

J.A. 585; *see also* ATF Form 4473, Question 11a, *available at* www.atf.gov/files/forms/download/atf-f-4473-1.pdf .

Abramski checked the "Yes" box in response to question 11a, indicating that he was the actual buyer. App. 4a; J.A. 585. After buying the gun, Abramski traveled to his uncle's hometown and met him at a nearby gun store. Abramski and his uncle filled out all the necessary federal paperwork to resell the gun to his uncle. His uncle passed the required background check and Abramski and his uncle paid all the necessary transfer fees. In the district court, an ATF agent testified that he had reviewed this gun transaction and that "Mr. Abramski not being a prohibited person and Mr. Alvarez [Abramski's uncle] not being a prohibited person, that makes that transfer, if you will, lawful." J.A. 111.

Nevertheless, after discovering that Abramski's uncle wrote a check for the gun *before* Abramski bought it, the government indicted Abramski for violating 18 U.S.C. § 922(a)(6) and 18 U.S.C. § 924(a)(1)(A). Section 922(a)(6) prohibits false statements to a gun dealer that are "material to the lawfulness of the sale." Section 924(a)(1)(A) prohibits false statements to a gun dealer concerning any information "required . . . to be kept" by the dealer under federal law.

Abramski moved to dismiss the indictment on the ground that neither § 922(a)(6) nor § 924(a)(1)(A) apply where a gun buyer purchased the gun to resell it to another lawful purchaser later. App. 8a; J.A. 241-42. The district court denied the motion in an oral ruling. App. 26a. Abramski later entered a conditional guilty plea, reserving his right to appeal on the issue of whether §§ 922(a)(6) and 924(a)(1)(A) apply when a person buys a gun intending to sell it to another lawful purchaser later. App. 10a; J.A. 520, 575. Abramski then timely appealed on that issue. App. 10a; J.A. 596.

The Fourth Circuit rejected Abramski's argument and affirmed. The court acknowledged that there was a split of authority among the circuits on whether § 922(a)(6) applied in a case like this one, where the ultimate recipient of the firearm was lawfully entitled to buy a gun himself. App. 14a. The Fourth Circuit adopted the reasoning of the Sixth and Eleventh Circuits, creating a 3-2 split among five circuits. App. 15a. Abramski timely filed a petition for a writ of certiorari seeking review of the Fourth Circuit's decision.

REASONS FOR GRANTING THE PETITION

I. FIVE CIRCUITS ARE SPLIT ON THE PROPER INTERPRETATION OF 18 U.S.C. § 922(a)(6).

Congress enacted 18 U.S.C. § 922(a)(6) to help "keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Barrett v. United States*, 423 U.S. 212, 220 (1976) (quoting the remarks of Senator Tydings, S. Rep. No. 90-1501 at 22 (1968)).

To achieve that goal, § 922(a)(6) makes it unlawful for a person buying a gun from a licensed dealer "knowingly to make a false or fictitious oral or written statement . . . intended or likely to deceive" a gun dealer "with respect to any fact material to the lawfulness of the sale." 18 U.S.C. § 922(a)(6).

This provision has long been used to prosecute "straw man" purchases in which a person buys firearms intending to later sell them to someone who cannot legally own a gun. *See United States v. Moore*, 109 F.3d 1456, 1460-61 (9th Cir. 1997) (en banc). "The straw man doctrine, which is nothing more than a long-standing construction of the relevant statutes, holds that a person violates section 922(a)(6) by acting as an intermediary or agent of someone who is ineligible to obtain a firearm from a licensed dealer and making a false statement that enables the ineligible principal to obtain a firearm." *Id.*

The "false statement" in these straw man prosecutions is the statement that the buyer is the "actual purchaser" of the firearm. Under the straw purchaser doctrine, the person standing at the counter buying the gun is a mere "straw man" and the true purchaser is the person not permitted to own the gun but who ultimately will receive it in the future. *Id.* at 1641.

This legal doctrine ordinarily is invoked only when the ultimate recipient of the gun is someone who cannot lawfully purchase a gun under federal law. In that circumstance, the identity of that final recipient—the real purchaser of the gun under the straw man doctrine—always will be "material to the lawfulness of the sale" because federal law prohibits gun dealers from selling

guns to those not lawfully permitted to buy them. *See* 18 U.S.C. § 922(d); *Polk*, 118 F.3d at 295; *Moore*, 109 F.3d at 1460-61; *see generally* Stephen P. Halbrook, *Firearms Law Deskbook* § 2:6 (2012-2013 ed.).

But the same is not true in cases like this one, where the ultimate recipient of the gun could lawfully buy a gun himself. In that circumstance, the circuits are divided on whether the initial buyer violates § 922(a)(6) by failing to disclose the intent to resell the gun to another lawful purchaser later. As explained below, the Fifth and Ninth Circuits have held that the identity of the ultimate recipient of a firearm in that circumstance is not material to the lawfulness of the initial sale. But the Fourth, Sixth, and Eleventh Circuits have rejected that reasoning, holding that the identity of the ultimate recipient *always* is material to the lawfulness of the initial sale. The Court should review this case to resolve this clear circuit split.

A. The Fifth and Ninth Circuits hold that the identity of the ultimate recipient of a firearm is not "material to the lawfulness of the sale" if that person could legally buy the gun himself.

The Fifth Circuit has squarely addressed the issue presented in this case and held that the identity of the ultimate recipient of a gun is not material to the lawfulness of the initial sale if both the initial buyer and the final recipient lawfully can buy firearms. *See United States v. Polk*, 118 F.3d 286 (5th Cir. 1997).

Polk was charged with aiding and abetting a violation of § 922(a)(6) after he paid a man named Davidson to buy guns for him. Polk argued "that the transactions at

[the gun store] were not 'straw purchases' because Polk had every right to purchase firearms (i.e., he was not an unlawful purchaser through Davidson)." *Id.* at 295. But the government contended that "Davidson's purchases *were* 'straw purchase' transactions because, notwithstanding the fact that Polk could lawfully purchase firearms, Davidson falsely informed a federally licensed firearms dealer that he was the true purchaser of the weapons." *Id.*

The Fifth Circuit agreed with Polk, holding that "[i]t is clear to us—indeed, the plain language of the statute compels the conclusion—that § 922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the 'lawfulness of the sale' of firearms." *Id.* "Thus, if the true purchaser can lawfully purchase a firearm directly, § 922(a)(6) liability (under a 'straw purchase' theory) does not attach." *Id.*

The Ninth Circuit also has indicated that § 922(a)(6) is not violated if the ultimate recipient of the gun lawfully can purchase firearms. *See United States v. Moore*, 109 F.3d 1456, 1460-61 (9th Cir. 1997) (en banc). In *Moore*, an elderly man named Wiley was convicted under § 922(a)(6) for purchasing a gun for a fourteen-year-old boy named Bobby. Wiley argued that he could not be convicted under § 922(a)(6) because he had actually purchased the gun for Bobby's mother, who was lawfully entitled to buy a gun. Wiley contended that he "was *her* lawful agent implementing *her* lawful decision; he was not a straw man, and thus, Wiley . . . did not violate the statute." *Id.* at 1461. The Ninth Circuit affirmed Wiley's conviction, holding that "[w]hether the defense is correct, of course, depends entirely on the facts. It was for the jury to decide whose agent Wiley was and whether Bobby was the actual buyer

of the gun." The Court explained that "[i]f the jurors had a reasonable doubt about whether the buyer was Bobby, they would have acquitted. They did not." *Id.*

Although the court affirmed Wiley's conviction, this discussion demonstrates that the Ninth Circuit, like the Fifth Circuit, does not believe § 922(a)(6) applies to straw purchases where the ultimate recipient of the firearm was someone like Bobby's mother, who lawfully could have purchased the gun herself.

B. The Fourth, Sixth, and Eleventh Circuits hold that the identity of the ultimate recipient of a firearm always is material to the lawfulness of the sale of that firearm.

In this case, the Fourth Circuit joined the Sixth and Eleventh Circuits in expressly rejecting the reasoning from *Polk* and *Moore*. *See United States v. Morales*, 687 F.3d 697, 701 (6th Cir. 2012); *United States v. Frazier*, 605 F.3d 1271, 1281 (11th Cir. 2010).

As the Fourth Circuit explained in this case, "[p]ut simply, we are unable to agree with *Polk*. It is clear to us that the prohibition against false and fictitious statements in § 922(a)(6) is not limited to those persons who are prohibited from buying or possessing a firearm." App. 15a.

The court held that the identity of the ultimate recipient of the firearm always is "material to the lawfulness of the sale":

> [T]o say that the identity of the actual purchaser is material to the lawfulness of one sale but not

> to another, is counterintuitive. Although *Polk* focused on whether one's identity affected the lawfulness of a sale under § 922(a)(6), we focus on whether one's identity is a fact that is material to the lawfulness of a sale. *The identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under § 922(a)(6).* Thus, it can be reasoned that although the lawfulness of a sale may change depending on the identity of the purchaser, the fact that the identity of the purchaser is material to the lawfulness of the sale does not.

App. 15a-16a (emphasis in original).

The Fourth Circuit's discussion quotes extensively from the Eleventh Circuit's decision in *Frazier*, which held that "false statements of the identity of the actual buyer satisfy the 'fact material to the lawfulness of a sale' element, regardless of whether the actors were all lawfully eligible to purchase a firearm." *Frazier*, 605 F.3d at 1280. The Sixth Circuit also adopted this reasoning in *Morales*, explaining that because "the *Frazier* court's reasoning is sound, we likewise hold that the identity of the actual purchaser is material to the lawfulness of a firearms transaction." *Morales*, 687 F.3d at 701.

In sum, the Fifth and Ninth Circuits interpret this important and frequently-used criminal statute in a manner directly contrary to the Fourth, Sixth, and Eleventh Circuits. As a result of this five-circuit split, well-intentioned citizens like Abramski can be convicted of a federal felony in Atlanta, Cincinnati, or

Richmond for conduct that is perfectly lawful in Houston or San Francisco. This deep circuit split in a key area of (purportedly) uniform federal criminal law warrants this Court's review.

II. THE CIRCUIT SPLIT CREATES A RECURRING INJUSTICE THAT WILL PLAGUE WELL-INTENTIONED GUN BUYERS.

This Court's review of the five-circuit split concerning §922(a)(6) is particularly important because this is a common, recurring issue for the federal criminal justice system. In 2011, for example, the government processed an average of 45,000 gun applications every day. *See* Fed. Bureau of Invest. National Instant Criminal Background Check System (NICS) Operations Report 2011 at 8, *available at* http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011. From those thousands of applications, there are hundreds of § 922(a)(6) prosecutions each year. *See* William J. Krouse, Cong. Research Serv., RL32842, Gun Control Legislation 24 (2012).

Moreover, several recent tragedies involving firearms have thrust gun enforcement issues to the center of the public consciousness. This, in turn, has put increasing pressure on law enforcement officials to get tougher on violators of existing gun laws. *See* Michael S. Schmidt, *Both Sides in Gun Debate Agree: Punish Background-Check Liars*, N.Y. Times, Jan. 14, 2013, at A1.

As a result, now more than ever, well-intentioned gun purchasers like Bruce Abramski risk felony prosecution in some federal circuits for conduct that is perfectly lawful

in others. And prosecutors under pressure to get tough on gun law violations may be less willing to exercise their discretion to avoid the injustice that results from this disagreement among the circuits. This Court should step in now and restore national uniformity to this important area of the country's gun laws.

III. THE FOURTH CIRCUIT'S INTERPRETATION OF § 922(a)(6) IS ERRONEOUS.

The deep circuit split on this recurring issue of criminal law easily is sufficient to warrant this Court's review. But here, review is particularly appropriate because the Fourth Circuit's decision is erroneous and will lead to felony prosecutions of ordinary, law-abiding citizens like Abramski for conduct that Congress did not intend to criminalize.

As explained above, this Court has held that the purpose of § 922(a)(6) is "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Barrett*, 423 U.S. at 220. But despite this stated purpose, the plain text of § 922(a)(6) and the rest of the federal gun control laws do not prohibit gun dealers from selling guns to persons who intend to later resell them illegally, nor do those laws prohibit a gun buyer from purchasing a gun intending to resell it illegally. *See* 18 U.S.C. §§ 922, 924. The same is true of the regulations from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) promulgated under these gun control statutes. *See* 27 C.F.R. § 478.99.

In other words, when Congress enacted the federal guns laws that exist today, it did not create an express statutory provision that prohibited "straw purchases." But courts soon realized that "[i]f an ineligible buyer could simply use a 'straw man' or agent to obtain a firearm from a licensed dealer, the statutory scheme would be too easily defeated." *United States v. Nelson*, 221 F.3d 1206, 1209 (11th Cir. 2000). Thus, in a purported effort to effectuate congressional intent, the lower courts interpreted § 922(a)(6) to prohibit straw purchases although the statute's plain text does not.

They did so through a legal fiction: the notion that the person standing at the counter buying a gun is not the "actual buyer" if he intends to later resell the gun to someone who cannot lawfully possess it. As the Ninth Circuit has explained, this legal fiction is simply an application of common law agency principles to effectuate congressional intent:

> In effect, this doctrine is merely an application of a principle that dates back to the time when the legal profession relied regularly on maxims expressed in Latin to illuminate the law: "*Qui facit per alium facit per se*," or "He who acts through another acts himself." In this context, it is a construction of the statute that directly serves the primary purpose of the Gun Control Act, which is "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."

Moore, 109 F.3d at 1461 (quoting *Barrett*, 423 U.S. at 220).

Applying this legal fiction, the government prosecutes straw purchasers under § 922(a)(6) by alleging that, when they stated on the ATF form that they were the "actual buyer" of the gun, they lied. The actual buyer, the government contends, is the person who will ultimately receive the gun and who is "not legally entitled to possess it because of age, criminal background, or incompetency." *Barrett*, 423 U.S. at 220. Because a gun dealer cannot sell a gun to that ultimate recipient—other portions of § 922 expressly prohibit those sales, *see* 18 U.S.C. § 922(b)—the government prosecutes the buyer under the theory that this "false statement" about who is the actual purchaser is "material to the lawfulness of the sale." *Moore*, 109 F.3d at 1464.

Whatever the merits of this straw purchaser fiction when the ultimate recipient is an ineligible person, it has no application in a case like this one, where both Abramski and his uncle are legally entitled to buy guns. In this circumstance, as the Fifth and Ninth Circuits have held, the identity of this future "actual buyer" is not material to the lawfulness of the sale. *See Polk*, 118 F.3d at 295. This is so because, under § 922 and its accompanying regulations, even if the gun dealer had been told of the buyer's intent to resell the gun to another lawful purchaser, the dealer still could have sold the gun. *See* 18 U.S.C. § 922; 27 C.F.R. § 478.99.

Tellingly, the government's position for many years was fully consistent with the Fifth and Ninth Circuit's reasoning. The government long advised gun buyers that the straw purchaser doctrine only applied when "the purchaser of record is merely being used to disguise the actual sale to another person, *who could not personally*

make the purchase or is prohibited from receiving or possessing a firearm." *United States v. Dollar*, 25 F. Supp. 2d 1320, 1324 (1998) (quoting Federal Regulations of Firearms and Ammunition, ATF P 5300.12 (1980)). Indeed, Form 4473 stated for years "that a 'straw purchase' may violate federal firearms laws if the licensee knows [or] has reasonable cause to believe that the true purchaser of the firearm(s) *is 'ineligible' to make that purchase directly.*" *Polk*, 118 F.3d at 295 n.7 (emphasis added).

In the mid-1990s, ATF changed the wording of Form 4473 and the Federal Firearms Regulations Reference Guide by "redefining the term 'straw purchase' to include eligible purchasers." *Dollar*, 25 F. Supp. 2d at 1324; *see also Polk*, 118 F.3d at 295 n.7. Neither change was subject to any public notice and comment procedure or other administrative rulemaking procedure.

Moreover, even now, the government's position on the straw purchaser doctrine remains confused. The current version of Form 4473 states that a buyer is the "actual buyer" of a firearm "if you are legitimately purchasing the firearm as a gift for a third party." *See* ATF Form 4473, Page 4, *available at* www.atf.gov/files/forms/download/atf-f-4473-1.pdf. There is no basis in the text or legislative history of § 922(a)(6) to punish a person who buys a gun for someone else with the intent to be repaid, but not the identically-situated person who buys a gun for someone else without expecting repayment.

Nevertheless, the Fourth Circuit accepted the government's current interpretation of the "straw purchaser" doctrine and upheld Abramski's conviction on the ground that "[t]*he identity of the purchaser is a*

constant that is always material to the lawfulness of the purchase of a firearm under § 922(a)(6)." App. 16a. (emphasis in original). Because the court-created straw purchaser doctrine does not apply here, the Fourth Circuit's reasoning is flawed. Abramski *did* provide the "identity of the purchaser" to the gun dealer—*he* was the purchaser. And he remained so until he later transferred ownership to his uncle by filling out the appropriate ATF forms at another licensed gun dealer in his uncle's hometown.

In short, Abramski did not provide any material false information about the "identity of the purchaser" of the firearm. App. 4a. At most, he made a false statement by checking the "yes" box on the ATF form's "actual buyer" question when the information on the form told him he should have checked the "no" box. J.A. 585. But no federal statute or regulation prohibits a gun dealer from selling a gun to someone who checks the "no" box.[2] Thus, Abramski's answer to the "actual buyer" question on that

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2. To be sure, ATF Form 4473 itself states that a dealer cannot sell a gun to someone who is not the "actual buyer." *See* ATF Form 4473, Question 11a, *available at* www.atf.gov/files/forms/ download/atf-f-4473-1.pdf. But that government form does not have the force of law. And for whatever reason, Congress and the ATF have never enacted statutes or regulations that prohibit dealers from selling guns in this circumstance, although Form 4473 seemingly implies that they have. *See* 18 U.S.C. §§ 922, 924; 27 C.F.R. § 478.99. Indeed, the only statute that even arguably addresses this issue is 18 U.S.C. § 922(d), which merely prohibits gun dealers from selling guns to *ineligible* purchasers, such as convicted felons and persons committed to mental institutions. *See* 18 U.S.C. § 922(d). Where both the initial purchaser and the ultimate recipient of the gun lawfully can buy a gun, § 922(d) does not apply.

ATF form was not material to the lawfulness of the sale, and the Fourth Circuit erred by holding that it was.

IV. THE COURT ALSO SHOULD REVIEW THE FOURTH CIRCUIT'S ERRONEOUS INTERPRETATION OF § 924(a)(1)(A).

The government also prosecuted Abramski under 18 U.S.C. § 924(a)(1)(A), a similar provision of the federal gun control laws that criminalizes knowingly making "any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter." 18 U.S.C. § 924(a)(1)(A).

Abramski's conviction under § 924(a)(1)(A) is infirm for the same reason as his § 922(a)(6) conviction: it turns entirely on the erroneous application of the straw purchaser doctrine. Section 924(a)(1)(A) applies only to information "required by this chapter to be kept" in a gun dealer's records. But there is no statute or regulation that *requires* gun dealers to record whether a gun purchaser intends to later sell the gun to someone else. In other words, the "actual buyer" question on ATF Form 4473, which Abramski filled out when buying the gun, is not information "required . . . to be kept" by the dealer. *See* 27 C.F.R. §§ 478.21, 478.124(f); *see also* ATF Form 4473, Question 11a, *available* at www.atf.gov/files/forms/download/atf-f-4473-1.pdf

To get around this hurdle, the government argues that the false statement "with respect to information

required by this chapter to be kept" is not Abramski's answer to Question 11 on the ATF Form, but rather the identification of *himself* as the buyer of the gun. Not surprisingly, the identity of the gun buyer *is* a piece of information required to be kept by gun dealers. *See* 18 U.S.C. § 922(b)(5). Relying on the court-created "straw purchaser" doctrine described above, the government convicted Abramski under § 924(a)(1)(A) on the theory that he lied about his identity when he bought the gun. The government insists that, although Abramski stood at the counter, filled out the forms, and bought the gun himself, he falsely identified himself as the buyer because it was really his uncle who bought the gun.

As explained above, applying the straw purchaser legal fiction in a case like this one conflicts with this Court's precedent. As the Court has explained, the purpose of these federal gun reporting laws is "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" *Barrett v. United States*, 423 U.S. 212, 220 (1976). These laws thus ensure the firearms cannot be "obtained by individuals whose possession of them would be contrary to the public interest." *Huddleston v. United States*, 415 U.S. 814, 825 (1974).

When viewed through the prism of this congressional intent, Abramski's purchase of the gun in this case is not subject to the court-created "straw purchaser" fiction. Abramski's uncle is a law-abiding citizen legally entitled to own a gun. J.A. 111. The only reason Abramski bought the gun was to take advantage of his law enforcement discount. App. 3a. Abramski provided the gun dealer with all the information "required to be kept" for that purchaser,

including his name, age, and contact information. When Abramski later transferred the gun to his uncle at another licensed gun dealer, he and his uncle again provided all the information "required . . . to be kept," 18 U.S.C. § 924(a)(1)(A), including his uncle's name, age, and contact information. App. 3a-4a; J.A. 111. Thus, the government had complete, truthful information about the identity and location of the gun at all times.

As noted above, even in cases involving a buyer intending to resell the gun illegally, the straw purchaser doctrine is on tenuous footing. Courts freely acknowledge that this legal fiction was created to plug a loophole in the federal gun laws concerning the illegal resale or transfer of guns. *See United States v. Ortiz*, 318 F.3d 1030, 1037 (11th Cir. 2003) ("If an *ineligible* buyer could simply use a 'straw man' or agent to obtain a firearm from a licensed dealer, the statutory scheme would be too easily defeated.") (emphasis added). Of course, it is ordinarily for Congress, not the courts, to address a problem that arises because a particular provision *should be* part of a statutory scheme, but is not. *See United States v. Evans*, 333 U.S. 483, 495 (1948).

In any event, whatever the merits of the "straw purchaser" doctrine in those cases involving illegal gun sales, the legal fiction simply cannot apply in a case like this one, where a well-intentioned person buys a gun for a family member who also is lawfully entitled to buy a gun. In that circumstance, the court-created doctrine does not plug a loophole in the gun laws; rather, it impermissibly expands the plain language of a criminal statute to cover conduct that Congress never intended to make criminal.

In sum, the Fourth Circuit's decision to uphold Abramski's conviction under §§ 922(a)(6) and 924(a)(1)(A) cannot be squared with the plain language of the statute, the well-reasoned decisions of the Fifth and Ninth Circuits, and this Court's precedent governing federal gun laws. Accordingly, the Court should grant review to clarify that the straw purchaser doctrine cannot be used to prosecute a gun buyer under §§ 922(a)(6) and 924(a)(1)(A) for failing to inform a gun dealer of the intent to later resell the gun to another lawful buyer.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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June 21, 2013

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DATED JANUARY 23, 2013

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-4992

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRUCE JAMES ABRAMSKI, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Glen E. Conrad, Chief District Judge.
(7:10-cr-00068-GEC-1).

Argued: December 4, 2012
Decided: January 23, 2013

Before KING, SHEDD, and DAVIS, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Shedd and Judge Davis joined.

Appendix A

OPINION

KING, Circuit Judge:

On November 17, 2009, in purchasing a Glock 19 handgun for his uncle in Pennsylvania, Bruce James Abramski, Jr., assured the firearms dealer in Virginia that he was the "actual buyer" of the handgun. Abramski was thereafter charged with being an illegal "straw purchaser" of the firearm. Pursuant to conditional pleas of guilty, Abramski was convicted in the Western District of Virginia on June 29, 2011, for two firearm offenses: (1) making a false statement that was material to the lawfulness of a firearm sale, in violation of 18 U.S.C. §§ 922(a)(6); and (2) making a false statement with respect to information required to be kept in the records of a licensed firearms dealer — that is, that he was the actual buyer of the firearm, when in fact he was buying it for someone else — in contravention of 18 U.S.C. § 924(a)(1)(A).

Prior to his guilty pleas, the district court denied Abramski's motions to dismiss the charges and suppress evidence. Abramski appeals from the criminal judgment, maintaining that the court erred in two respects. First, he argues that the court erred in denying his motion to dismiss the indictment because his conduct was beyond the purview of §§ 922(a)(6) and 924(a)(1)(A), in that both he and his uncle were legally entitled to purchase and own the Glock 19 handgun. Second, he contends that the court erred in denying his motion to suppress on the ground that inculpatory evidence had been unconstitutionally

seized from his residence. As explained below, we reject Abramski's contentions of error and affirm.

I.

The facts underlying Abramski's convictions are undisputed. Prior to November 2009, Abramski, who lived in Franklin County, Virginia, and his uncle, Angel Alvarez, who resided in Pennsylvania, had several conversations concerning Alvarez's desire to obtain a Glock 19 handgun. Abramski offered to purchase a Glock 19 for Alvarez because, as a former Virginia police officer, Abramski could obtain a favorable price from a firearms dealer that catered to police officers in Collinsville, Virginia. Before purchasing the handgun, Abramski spoke with three licensed federal firearms dealers and discussed how to legally conduct such an acquisition. The dealers apparently advised Abramski, in essence, that a licensed dealer in Pennsylvania could complete the transfer to his uncle after the handgun had been purchased by Abramski in Virginia. In order to implement the transaction, Alvarez sent Abramski a check for $400 on November 15, 2009. The term "Glock 19 handgun" was written in the memo line of the check.

On November 17, 2009, Abramski went to the firearms dealer in Collinsville and purchased a Glock 19 handgun, among other items, paying for them with more than $2000 in cash. In conducting the transaction, Abramski completed Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Form 4473, which contained several questions about the purchase of firearms, to be answered

by checking boxes marked "Yes" or "No." Of importance here, question 11.a. on the ATF Form 4473 stated:

> Are you the actual transferee/buyer of the firearm(s) listed on this form? *Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.*

J.A. 585 (emphasis on Form 4473).[1] Abramski checked the answer "Yes" to question 11.a. Three days later, on November 20, 2009, the $400 check from Alvarez was deposited in Abramski's bank account, and the next day Abramski transferred the Glock 19 handgun to Alvarez at a licensed federal firearms dealer in Easton, Pennsylvania. At that time, Alvarez gave Abramski a receipt confirming the transfer, reflecting that Alvarez had purchased the Glock 19 handgun for $400.

Meanwhile, on November 12, 2009, a bank robbery occurred at Franklin Community Bank in Rocky Mount, Virginia. An investigation of the robbery led the FBI to suspect Abramski. Abramski had been fired from the Roanoke police department in 2007, looked similar to the masked bank robber, and was down on his luck (Abramski and his wife had recently separated and their home was in foreclosure).

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1. Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

Abramski was arrested in early July 2010 on state law charges relating to the bank robbery. In connection therewith, two FBI agents investigating the robbery sought and secured search warrants relating to the investigation. The first warrant was issued on July 1, 2010, for the search of a home on Highland Farm Road in Calloway, Virginia, where Abramski's parents lived, and where Abramski had moved a short time earlier. The "items to be seized" included things believed to be related to the bank robbery, such as a black square duffle bag, a black ski mask, firearms, and the catch-all phrase covering "[a]ny and all articles that appear to be relevant to the commission of a robbery." J.A. 224. The second search warrant was obtained about three weeks later, on July 19, 2010, for a home on Iron Ridge Road in Rocky Mount, Virginia, which was Abramski's marital residence. This warrant specified some of the same items as the first warrant and also included the same catch-all phrase. In executing the search warrant for the Iron Ridge Road property, agents found and seized a green Franklin Community Bank zippered bag containing the written receipt confirming the transfer of the Glock 19 handgun from Abramski to Alvarez on November 21, 2009.

The federal authorities have never charged Abramski with bank robbery, and the state bank robbery charges against him were dismissed on October 15, 2010. On November 18, 2010, however, the federal grand jury indicted Abramski for the firearms offenses underlying this appeal. A corrective superseding indictment that apparently only deleted information about the firearms dealer was returned on May 12, 2011. The superseding

indictment (hereinafter the "indictment") charged Abramski, in Count One, with making the false and fictitious statement on the ATF Form 4473 that he was the actual buyer of the Glock handgun, in violation of 18 U.S.C. § 922(a)(6) and § 924 (a)(2).[2] Count Two of the indictment

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2. Count One of the indictment alleged, in relevant part, as follows:

> On or about November 17, 2009, in the Western Judicial District of Virginia, the defendant, BRUCE JAMES ABRAMSKI, JR., in connection with his acquisition of a firearm, a Glock Model 19, 9 mm semi-automatic pistol, from a federally licensed firearms dealer, did knowingly make a false and fictitious written statement to said dealer, which statement was likely to deceive said dealer, as to a fact material to the lawfulness of such sale of the said firearm to the defendant, BRUCE JAMES ABRAMSKI, JR., under chapter 44 of Title 18, in that the defendant, BRUCE JAMES ABRAMSKI, JR., represented that he was the actual buyer of the firearm, when in fact, as the defendant . . . then well knew, he was buying the firearm for another individual [in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2)].

J.A. 381.

Section 922(a)(6) provides, in relevant part,

> [It shall be unlawful] for any person in connection with the acquisition of . . . any firearm . . . knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive such . . . dealer . . . with respect to any fact material to the lawfulness of the sale[.]

18 U.S.C. § 922(a)(6). Section 924(a)(2) of Title 18 provides for punishment of a person who has violated § 922(a)(6) by both fine and imprisonment.

charged Abramski with making a false statement with respect to information required to be kept in the records of a licensed firearms dealer, in violation of § 924(a)(1)(A).[3] In both charges, the prosecution relied on the theory that Abramski was merely a "straw purchaser" of the firearm that was immediately transferred to Alvarez.[4]

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3. Count Two of the indictment alleged, in relevant part, as follows:

> BRUCE JAMES ABRAMSKI, JR., knowingly made a false statement and representation in connection with his acquisition of a firearm, to a federally licensed firearms dealer, with respect to information required by the provisions of Chapter 44 of Title 18, United States Code, to be kept in the records of Town Police Supply, in that [he] represented that he was the actual buyer of the firearm, when in fact, as the defendant, BRUCE JAMES ABRAMSKI, JR., then well knew, he was buying the firearm for another individual [in violation of 18 U.S.C. § 924(a)(1)(A)].

J.A. 382.

Section 924(a)(1)(A) provides, in relevant part,

> [It shall be unlawful to] knowingly make[ ] any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter[.]

18 U.S.C. § 924(a)(1)(A).

4. A "straw purchase" of a firearm has been described as a sale where the individual making the purchase represents himself to be the actual buyer, but is actually the agent of another person who will receive possession of the firearm. *See United States v. Nelson*, 221 F.3d 1206, 1208-09 (11th Cir. 2000).

On March 10, 2011, Abramski moved to dismiss both counts of the indictment (the "first dismissal motion"), contending that, because the firearm was legally transferred to Alvarez and Abramski made no material misrepresentations to the Virginia firearms dealer, the firearms statutes were never intended to punish his conduct. Also on March 10, 2011, Abramski moved to suppress the receipt found in the money bag in his home, arguing that its seizure was unconstitutional under the Fourth Amendment.[5] The district court denied both these motions from the bench on March 14, 2011. *See* J.A. 276, 310-11. The court ruled, first of all, that 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A) were violated when a false or fictitious statement is made on an ATF Form 4473, and, second, that the search warrant for Abramski's home was amply supported by probable cause. In any event, according to the court, seizure of the receipt was proper under the good faith exception to the exclusionary rule.

On April 18, 2011, after the court had denied his first dismissal motion and his initial motion to suppress, Abramski filed a second motion to dismiss the indictment (the "second dismissal motion"). He therein contended that question 11.a. on the ATF Form 4473 is not required

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5. In his March 10, 2011, motion to suppress, Abramski incorrectly asserted that the receipt had been seized during execution of the search warrant for the Highland Farm Road property. *See* J.A. 220-21. During the March 14, 2011, court hearing, however, Abramski orally amended his motion to suppress to challenge the constitutionality of the second warrant, the one dedicated to the Iron Ridge Road property, where the receipt was actually seized. *See id.* at 261.

by law (but was created by the ATF) and that, inasmuch as the ATF itself decided that the "actual buyer" of a firearm must be ascertained at the time of acquisition, the ATF had failed to comply with the notice and comment procedures required by the Administrative Procedure Act. After conducting a hearing on the second dismissal motion on April 22, 2011, the district court rejected that motion by a published decision filed on April 25, 2011. *See United States v. Abramski*, 778 F.Supp.2d 678, 680 (W. D. Va. 2011) (determining that disclosure of actual firearm purchaser is required by law). Notably, Abramski does not appeal the court's denial of the second dismissal motion.[6] On June 27, 2011, Abramski filed a second motion to suppress, asserting that, after the denial of his first motion to suppress, he discovered evidence that undermined the credibility of a witness who had provided information concerning the search warrants. *See* J.A. 385. The court denied this suppression motion from the bench following an evidentiary hearing conducted on June 27, 2011, and the second motion to suppress is not relevant to this appeal. *See* J.A. 514.

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6. From our assessment of the briefs, the government appears to consider the district court's denial of the second dismissal motion to be a subject of this appeal. *See* Br. of Appellee 6 (citing district court's April 25, 2011, decision denying second dismissal motion). We emphasize, however, that Abramski has, on the dismissal point, only appealed the denial of his first dismissal motion, which was disposed of from the bench on March 14, 2011. *See* Br. of Appellant 3 (recognizing that Abramski's second dismissal motion was "based upon administrative deficiencies," and was denied, and advising that "Abramski does not raise this issue on appeal").

On June 29, 2011, pursuant to a plea agreement with the United States Attorney, Abramski entered conditional guilty pleas, pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, to both charges in the indictment.[7] On October 3, 2011, the court sentenced Abramski to five years of probation on each offense, to run concurrently. Abramski thereafter filed a timely notice of appeal.

II.

We review de novo legal issues relating to statutory construction. *United States v. Broncheau*, 645 F.3d 676, 683 (4th Cir. 2011). In evaluating a district court's denial of a motion to suppress evidence, we review the court's factual findings for clear error and its legal determinations de novo. *United States v. Doyle*, 650 F.3d 460, 466 (4th Cir. 2011). In evaluating a probable cause issue with respect to a search warrant, we assess whether the magistrate judge had a "substantial basis" for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983).

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7. Rule 11(a)(2) of the Federal Rules of Criminal Procedure provides, in pertinent part, that:

> With the consent of the court and the government, a defendant may enter a conditional plea of guilty[,] reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion.

Fed. R. Crim. P. 11(a)(2).

Appendix A

III.

We must first address a potential procedural defect that could impact our jurisdiction in this appeal. This court has recognized that, pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, the "'direct review of an adverse ruling on a pretrial motion is available only if the defendant expressly preserves that right by entering a conditional guilty plea.'" *See United States v. Bundy*, 392 F.3d 641, 645 (4th Cir. 2004) (quoting *United States v. Wiggins*, 905 F.2d 51, 52 (4th Cir. 1990). Indeed, we have observed that, "[a]bsent a valid conditional guilty plea, we will dismiss a defendant's appeal from an adverse pretrial ruling on a non-jurisdictional issue." *Bundy*, 392 F.3d at 645.

In order for a defendant to pursue an appeal after a Rule 11(a)(2) conditional guilty plea, the relevant agreement must be in writing and must identify the specific pretrial rulings that the defendant intends to appeal. These requirements serve to "document that a particular plea was in fact conditional, and . . . identify precisely what pretrial issues have been preserved for appellate review." Fed. R. Crim. P. 11 advisory committee's note. As we have explained, the "conditions must be expressly described in writing, or at least so clearly shown on the record that there is no doubt that a conditional plea was agreed to." *Bundy*, 392 F.3d at 645.

Abramski's plea agreement identifies only one adverse ruling that he intends to appeal, and that ruling was made on June 28, 2011, the day prior to his guilty pleas. The plea

agreement describes the conditional nature of his guilty pleas as follows:

> I understand that the United States consents to my making of a conditional plea of guilty in this case in accordance with Rule 11(a)(2) of the Federal Rules of Criminal Procedure. I reserve the right to appeal any and all adverse rulings of the court to date, to specifically include the court's *oral* ruling *at a charge conference in chambers yesterday, June 28*, that the subsequent legal transfer of the firearm in question from the defendant Abramski to his uncle Angel "Danny" Alvarez, in Pennsylvania, does not negate the illegality of the defendant's acts in acquiring the firearm from a federally licensed firearm dealer in Virginia.

J.A. 575 (handwritten additions emphasized). Although the issue resolved by the first dismissal motion is fairly framed in the plea agreement, the agreement misidentifies the ruling at the June 28 charge conference, rather than the court's denial of the first dismissal motion, as the issue sought to be appealed. Perhaps more significantly, an appeal of the suppression rulings is not mentioned in the plea agreement.

During the plea hearing, the issues reserved for appeal were not specified on the record, although the district court and the prosecutors briefly discussed alterations of the plea agreement, presumably for the purpose of specifying issues that could be appealed. The court suggested the following:

> if it makes it any simpler, why don't you just change [the conditional plea] to read that the defendant reserves the right to appeal all pretrial legal rulings that the Court has made? Why is it necessary that we have more complicated language? Couldn't you just agree to that?

J.A. 520. In response, the government agreed to the court's suggestion. Based on this dialogue, it is evident that the parties anticipated that the defendant could appeal court rulings other than the single one specified in the plea agreement. Rule 11(a)(2) and our precedent are clear, however, that the issues to be appealed after a conditional guilty plea should be specified in writing, or, at the very least, clearly stated on the record. Nevertheless, because the court and the government orally agreed in broad terms to Abramski's conditional pleas, we are satisfied to address the merits of his appeal on the first dismissal motion and the first motion to suppress. Accordingly, we possess jurisdiction pursuant to 28 U.S.C. § 1291.

A.

1.

Abramski first contends that the district court erred in denying his motion to dismiss the charges in the indictment, and in ruling that Abramski's purchase of the Glock 19 handgun constituted a straw purchase that violated 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A). Abramski maintains that, because he and Alvarez were both legally entitled to purchase such a firearm, he was not a "straw

purchaser" and his "Yes" answer on the ATF Form 4473 — representing that he was the "actual buyer" thereof — was not material and was never intended to be punished by the Gun Control Act of 1968, or by §§ 922(a)(6) or 924(a)(1)(A). Indeed, Abramski asserts that Congress's intent in enacting those statutes was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them." Br. of Appellant 12. Under Abramski's theory, he could only be prosecuted for his Virginia acquisition of the Glock 19 handgun if Alvarez had been ineligible to possess a firearm, e.g., a convicted felon, thereby rendering the "actual buyer" question on the ATF Form 4473 "material to the lawfulness of the sale." *See* 18 U.S.C. § 922(a)(6). On the legal proposition pursued by Abramski, there appears to be a split in the courts of appeals. At least three of our sister circuits have heretofore addressed the issue, and one of them seems to agree with Abramski.

In support of his position, Abramski relies on the Fifth Circuit's decision in *United States v. Polk*, 118 F.3d 286 (5th Cir. 1997). In that case, the court of appeals assessed whether § 922(a)(6) liability attached where "the true purchaser [here, Alvarez] can lawfully purchase a firearm directly." *Id.* at 295. The Fifth Circuit determined that it did not, ruling that

> the plain language of the statute compels the conclusion . . . that § 922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the "*lawfulness of the sale*" of firearms. . . . Thus, if the true purchaser can

> lawfully purchase a firearm directly, § 922(a)(6) liability (under a "straw purchase" theory) does not attach.

Id. (emphasis in original).

Put simply, we are unable to agree with *Polk*. It is clear to us that the prohibition against false and fictitious statements in § 922(a)(6) is not limited to those persons who are prohibited from buying or possessing a firearm. To establish a violation of § 922(a)(6), the prosecution is obligated to prove four elements: "(1) the defendant knowingly made (2) a false or fictitious oral or written statement that was (3) material to the lawfulness of the sale or disposition of a firearm, and was (4) intended to deceive or likely to deceive a firearms dealer." *United States v. Harvey*, 653 F.3d 388, 393 (6th Cir. 2011). The straw purchaser issue goes directly to the third of these essential elements — materiality.

Abramski's contention that § 922(a)(6) does not apply to a firearm transaction involving two eligible purchasers was recently rejected by the Sixth Circuit in *United States v. Morales*, 687 F.3d 697 (6th Cir. 2012). In that case, the court also took issue with the reasoning of *Polk* and agreed with the Eleventh Circuit's decision in *United States v. Frazier*, 605 F.3d 1271, 1280 (11th Cir. 2010). In *Frazier*, the court of appeals had likewise rejected *Polk*, explaining its decision in language that we readily approve:

> [t]o say that the identity of the actual purchaser is material to the lawfulness of one sale but not to another, is counterintuitive. Although

> *Polk* focused on whether one's identity affected the lawfulness of a sale under § 922(a)(6), we focus on whether one's identity is a fact that is material to the lawfulness of a sale. *The identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under § 922(a)(6).* Thus, it can be reasoned that although the lawfulness of a sale may change depending on the identity of the purchaser, the fact that the identity of the purchaser is material to the lawfulness of the sale does not.

Id. (emphasis added).

In denying Abramski's first dismissal motion from the bench on March 14, 2011, the court relied on the *Frazier* case, expressing concern that Abramski's theory "creates an extra element in the prosecution of the offense" in that the government would have to "prove that the middleman, in this case [Abramski], knew that a subsequent purchaser was a prohibited person." J.A. 266. The court rejected that theory, ruling that "both counts of the indictment are legally sound. It seems to me that, if the government is able to prove what the grand jury has alleged in the indictment, that the defendant would be in violation of these two statutes." J.A. 276. In sum, we are satisfied that the Sixth and Eleventh Circuits, as well as the district court, correctly and properly ruled that the identity of the actual purchaser of a firearm is a constant that is always material to the lawfulness of a firearm acquisition under § 922(a)(6).

Appendix A

The ATF Form 4473, as completed and signed by Abramski, warned him — in bold type — that he was not the actual buyer of the Glock 19 handgun if he was buying it for someone else. And the undisputed facts show that Abramski's transfer of the Glock 19 to Alvarez was not an afterthought. On this record, that transfer was a carefully calculated event — indeed, it was the sole reason for Abramski's purchase of the Glock 19 handgun. Because the identity of the actual purchaser of the handgun was material to the lawfulness of its acquisition by Abramski on November 17, 2009, he made a false and fictitious statement to the licensed dealer when he answered "Yes" to question 11.a. on the ATF Form 4473, assuring the dealer that he was the actual buyer.

2.

Turning to Count Two, § 924(a)(1)(A) of Title 18 criminalizes "any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter." 18 U.S.C. § 924(a)(1)(A). To establish a violation of § 924(a)(1)(A), the government must prove that: (1) the dealer was a federally licensed firearms dealer at the time the offense occurred; (2) the defendant made a false statement or representation in a record that the licensed firearm dealer was required by federal law to maintain; and (3) the defendant made the false statement with knowledge of its falsity. This statutory provision does not require that the falsehood on the ATF Form 4473 relate to the lawfulness of the firearm acquisition itself. Although Abramski argues that his "Yes" answer

to question 11.a. on the Form 4473 was not material to the recordkeeping requirements of § 924(a)(1)(A), the plain statutory language is unambiguous, and it does not require a showing of materiality. *See United States v. Johnson*, 680 F.3d 1140, 1144 (9th Cir. 2012) ("the text of § 924(a)(1)(A) unambiguously describes which false statements and representations it prohibits — simply those that are made with respect to information that is required to be kept by federally licensed firearms dealers"); *United States v. Sullivan*, 459 F.2d 993, 994 (8th Cir. 1972) ("While a violation of 18 U.S.C.A. § 922(a)(6) expressly requires a showing of materiality no such expression is found in § 924(a).").

3.

In sum, the assertion that Abramski was the actual buyer of the Glock 19 handgun was a false and fictitious answer to question 11.a. of the ATF Form 4473, and that false statement was material to the lawfulness of the Virginia sale of the handgun. Moreover, the identity of the actual purchaser of the Glock 19 handgun was a fact required to be maintained by the Virginia firearms dealer that sold the firearm. By virtue of the bold-print warning on question 11.a. of the ATF Form 4473, Abramski was on notice that he was not the actual buyer of the handgun if he was purchasing it for someone else. Accordingly, the district court properly denied Abramski's motion to dismiss both charges of the indictment.

Appendix A

B.

Abramski next contends that the second search warrant (relating to the Iron Ridge Road property), was defectively issued and not supported by probable cause. As a result, he maintains that the agents' seizure of the receipt concerning his transaction with Alvarez from the Iron Ridge Road residence exceeded the scope of that warrant.

As spelled out above, the FBI agents executed two search warrants in their robbery investigation of Abramski. They first searched his parents' home on Highland Farm Road in Calloway, and the results of that search led them, at least in part, to also search Abramski's marital home on Iron Ridge Road in Rocky Mount. Abramski argues on appeal, first, that the affidavit for the search warrant for the Iron Ridge Road property was legally insufficient. Additionally, Abramski contends that execution of the search warrant for the Iron Ridge Road property contravened the warrant's directives, resulting in an unconstitutional seizure of the receipt for Abramski's transfer of the Glock 19 handgun to Alvarez.

1.

The affidavit supporting the search warrant for the Highland Farm Road property included information about what the bank robber was wearing, what he carried, and the vehicle he was driving (a blue Ford Explorer). The affidavit shows that one of the bank tellers picked Abramski's picture from a photo lineup as a "suspicious

white male who visited the bank" several days before the robbery. J.A. 230. The affidavit explained that when Abramski made his purchase of the Glock 19 handgun at Town Police Supply, he paid in cash from a green zippered money pouch with white lettering. It also demonstrated that Abramski had limited financial resources and had been discharged by the Roanoke police department because he was believed to have stolen money during an investigation. Among other details, the affidavit revealed that Abramski had tested a green Ford Explorer on the day of the robbery.

During the search on Highland Farm Road, Abramski's father told the officers that Abramski had only been living there for about a week. The affidavit supporting the search warrant for the Iron Ridge Road property included information that Abramski may have left his belongings at that residence. The affidavit explained that the agents had already seized inculpatory evidence in the Highland Farm Road search, including a "green zippered money pouch," and specified that the application for the Iron Ridge Road warrant "does not seek authority to seize these items." Nevertheless, one of the agents conducting the search at Iron Ridge Road found an additional green zippered money bag from Franklin Community Bank. The receipt for the transfer to Alvarez of the Glock 19 handgun was found and seized from inside that bag.

Following the suppression hearing conducted on March 14, 2011, the district court ruled from the bench that "both warrants were valid and that the items seized

pursuant to those search warrants are properly admitted." J.A. 310. The court then concluded that "[c]learly there's probable cause for both search warrants."[8] *Id.*

2.

A judicial officer's determination of probable cause is entitled to "great deference" by a reviewing court. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983). "The probable cause standard 'is not defined by bright lines and rigid boundaries' but 'allows a [judicial officer] to review the facts and circumstances as a whole and make a common sense determination' whether there is a fair probability that evidence of a crime will be found." *United States v. Wellman*, 663 F.3d 224, 228 (4th Cir. 2011) (quoting *United States v. Grossman*, 400 F.3d 212, 217 (4th Cir. 2005)).

The prosecution maintains that the district court's suppression ruling must be affirmed, arguing that the "catch-all" clause in the search warrant for the Iron Ridge Road property required seizure of the receipt. It asserts that the green Franklin Community Bank money bag fell within that clause, as did the handgun receipt, because the officers then believed that Abramski had robbed the bank with a Glock handgun. The United States also contends that, in any event, the green bag

8. Finally, in the alternative, the court determined that, "even if the warrants were too broad or somewhat stale, I think that the officers were entitled to, in good faith, rely on the issuance of the warrants in conducting the searches. So even if the probable cause is somewhat weak, I think good faith protects the outcome of the searches." *Id.* at 310-11.

was in plain view, and that the officers were entitled to seize it because its incriminating character was readily apparent. The prosecutors finally argue that the good faith exception applies, even if the search warrant was based on stale evidence and seizure of the green bag was somehow improper.

a.

First and foremost, it is clear to us that the Iron Ridge Road search warrant was supported by probable cause. The supporting affidavit for that warrant connected Abramski to the Rocky Mount bank robbery in several ways:

- Abramski was flagged as a suspicious customer at the bank just a few days before the robbery;
- He was having financial difficulties;
- He had been fired by the police department for allegedly stealing money;
- He was about the same height as the robber;
- Abramski was seen wearing a watch and jacket similar to those worn by the robber;
- He had tested a green Ford Explorer on the day of the robbery, and the witnesses asserted that the robber made his getaway in a blue Ford Explorer; and

- Abramski had purchased firearms with a large amount of cash after the bank robbery.

In these circumstances, there was a substantial basis for the magistrate judge to conclude that probable cause existed for the search of Abramski's residence on Iron Ridge Road.

b.

Finally, we reject Abramski's challenge to the scope of the search warrant for the Iron Ridge Road residence. The agents were then investigating the robbery of Franklin Community Bank, which had been carried out with a firearm similar to a Glock 19 handgun. When the agents discovered the green zippered bag bearing the Franklin Community Bank logo, and when they found inside that bag the receipt for Alvarez's purchase of the Glock 19 handgun, such evidence had to be seized. In these circumstances, the Iron Ridge Road warrant was properly issued, and the agents' seizure of the receipt was not unconstitutional. The district court therefore did not err in declining to suppress that evidence.[9]

---

9. In his reply brief, Abramski asserts that neither of the affidavits supporting the search warrant demonstrates that the agents believed the items sought would be found at Abramski's residence seven months after the robbery. Rep. Br. of Appellant 5. Inasmuch as this is a staleness argument concerning the timeliness of the warrants, we need not address it, in that it was abandoned by not being raised in Abramski's opening brief on appeal. *See United States v. Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004) (recognizing that "contentions not raised in the argument section of the opening brief are abandoned").

Appendix A

IV.

Pursuant to the foregoing, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX B — EXCERPT OF TRANSCRIPT OF MOTIONS HEARING IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, DATED MARCH 14, 2011

[1]UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CRIMINAL NO. 7:10-CR-00068
MARCH 14, 2011 2:07 P.M.
MOTION HEARING
VOLUME I OF I

Before:
HONORABLE GLEN E. CONRAD
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BRUCE JAMES ABRAMSKI, JR.,

Defendant.

* * *

[32] . . . the notices within the form. Also, "I understand that by answering "yes" to question 11(a) when I am not

the actual buyer is a crime punishable as a felony under federal law and may also violate state and/or local law."

Your Honor, as to the issue as to the motion to dismiss, if you do not have any other questions for the government, we would rely on the case law that we have submitted.

THE COURT: Anything else, Mr. Cleaveland?

MR. CLEAVELAND: No, Your Honor, not on this motion.

THE COURT: Well, as I've said, I think that both counts of the indictment are legally sound. It seems to me that, if the government is able to prove what the grand jury has alleged in the indictment, that the defendant would be in violation of these two statutes, and, accordingly, the motion to dismiss the indictment must be denied.

Are there other motions? I know that there's one final motion concerning the warrant, Mr. Cleaveland.

MR. CLEAVELAND: That's correct.

THE COURT: At least one more motion, maybe more.

MR. CLEAVELAND: No. I think just the motion to dismiss is the only one we have.

THE COURT: Okay.

MR. CLEAVELAND: Your Honor, I would like to ask that Special Agent Kenya Gillis take the stand.

THE COURT: Is there an opening comment? What are . . .

* * * *

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, FILED OCTOBER 4, 2011

AO 245B (Rev. 06/05 - VAW Additions 6/05)
Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
Western District of Virginia

UNITED STATES OF AMERICA

v.

BRUCE JAMES ABRAMSKI, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: DVAW710CR000068-001

Case Number:

USM Number: 15779-084

William H. Cleaveland, Esq.
Defendant's Attorney

THE DEFENDANT:

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☒ pleaded guilty to count(s) One and Two

☐ pleaded *nolo contendere* to count(s) which was accepted by the court

☐ was found guilty on count(s) after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 922(a)(6)	False Statement in the Acquisition of a Firearm	11/17/2009	1
18 U.S.C. § 924(a)(1)(A)	Cause a Federally Licensed Firearms Dealer to Keep False Records	11/17/2009	2

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

Appendix C

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 3, 2011
Date of Imposition of Judgment

/s/
Signature of Judge

Glen E. Conrad, Chief United States District Judge
Name and Title of Judge

October 3, 2011
Date

Appendix C

AO 245B (Rev. 06/05 - VAW Additions 6/05)
Judgment in a Criminal Case
Sheet 4—Probation

Judgment—Page 2 of 5

DEFENDANT: BRUCE JAMES ABRAMSKI, JR.
CASE NUMBER: DVAW710CR000068-001

PROBATION

The defendant is hereby sentenced to probation for a term of:

Five (5) Years, consisting of Five (5) Years as to each of Counts One and Two, to run concurrently

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

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☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate

with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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AO 245B (Rev. 06/05 - VAW Additions 6/05)
Judgment in a Criminal Case
Sheet 4C—Probation

Judgment—Page 3 of 5

DEFENDANT: BRUCE JAMES ABRAMSKI, JR.
CASE NUMBER: DVAW710CR000068-001

SPECIAL CONDITIONS OF SUPERVISION

1 The defendant shall participate in the Location Monitoring Program under home detention for a period of six months and shall abide by all program requirements. The defendant is restricted to his residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as pre-approved by the officer.

3 - The defendant shall pay the costs of the location monitoring services.

4 - The defendant shall reside in a residence free of firearms, ammunition, destructive devices, and dangerous weapons.

5 - The defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of firearms.

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AO 245B (Rev. 06/05 - VAW Additions 6/05)
Judgment in a Criminal Case
Sheet 5 - Criminal Monetary Penalties

Judgment-Page 4 of 5

DEFENDANT: BRUCE JAMES ABRAMSKI, JR.
CASE NUMBER: DVAW710CR000068-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$200.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

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Name of Payee	Total Loss*

Restitution Ordered	Priority or Percentage

TOTALS	$0.00	$0.00

☐ Restitution amount ordered pursuant to plea agreement $_____.

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 13, 1996.

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☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine
☐ restitution is modified as follows:

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AO 245B (Rev. 06/05 - VAW Additions 6/05)
Judgment in a Criminal Case
Sheet 6 - Schedule of Payments

Judgment-Page 5 of 5

DEFENDANT: BRUCE JAMES ABRAMSKI, JR.
CASE NUMBER: DVAW710CR000068-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, the total criminal monetary penalties are due immediately and payable as follows:

A ☒ Lump sum payment of $ 200 immediately, balance payable

☐ not later than _____, or

☒ in accordance ☒ C, ☐ D, ☐ E, ☐ F or, ☐ G below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F or, ☐ G below); or

C ☒ Payment in equal monthly (*e.g.*, weekly, monthly, quarterly) installments of $ 50 over a period of months (*e.g.*, months or years), to commence 30 days (*e.g.*, 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (*e.g.*, weekly, monthly, quarterly) installments of $_____ over a period of _____ (*e.g.*, months or years), to commence _____ (*e.g.*, 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (*e.g.*, 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ During the term of imprisonment, payment in equal _____ (*e.g.*, weekly, monthly, quarterly) installments of $_____, or ____% of the defendant's income, whichever is greater, to commence _____ (*e.g.*, 30 or 60 days) after the date of this judgment; AND payment in equal _____ (*e.g.*, weekly, monthly, quarterly) installments of $_____ during the term of supervised release, to commence _____ (*e.g.*, 30 or 60 days) after release from imprisonment.

G ☐ Special instructions regarding the payment of criminal monetary penalties:

Any installment schedule shall not preclude enforcement of the restitution or fine order by the United States under 18 U.S.C. §§ 3613 and 3664(m).

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or

supervision, and the defendant shall notify the probation officer and the U.S. Attorney of any change in the defendant's economic circumstances that may affect the defendant's ability to pay.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, P.O. Box 1234, Roanoke, Virginia 24006, for disbursement.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

OPPOSITION BRIEF

No. 12-1493

In the Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's statement that he was the actual buyer of a firearm on a Bureau of Alcohol, Tobacco, Firearms and Explosives Form 4473 was a false statement "material to the lawfulness of the sale" under 18 U.S.C. 922(a)(6), where petitioner purchased the firearm for his uncle and both he and his uncle were eligible to purchase a firearm.

2. Whether the identity of the actual buyer of a firearm is information that is required to be kept in the records of a federal firearms dealer under 18 U.S.C. 924(a)(1)(A).

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In the Supreme Court of the United States

No. 12-1493

BRUCE JAMES ABRAMSKI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 706 F.3d 307.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2013. On April 4, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 21, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Western District of Virginia, petitioner was convicted on one count of making a false statement material to the lawfulness of a firearm sale, in violation of 18 U.S.C. 922(a)(6); and one count of

making a false statement with respect to information required to be kept in the records of a licensed firearms dealer, in violation of 18 U.S.C. 924(a)(1)(A). Pet. App. 2a. The district court sentenced petitioner to five years of probation on each count, to run concurrently. *Id.* at 10a. The court of appeals affirmed. *Id.* at 1a-24a.

1. Under 18 U.S.C. 922(a)(6), it is unlawful "for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a * * * licensed dealer * * * knowingly to make any false or fictitious oral or written statement * * * intended or likely to deceive such * * * dealer * * * with respect to any fact material to the lawfulness of the sale * * * under the provisions of this chapter."

Under 18 U.S.C. 924(a)(1)(A), it is unlawful to "knowingly make[] any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter."

2. Petitioner is a resident of Virginia and a former state police officer. In 2009, petitioner spoke to his uncle, Angel Alvarez, a resident of Pennsylvania, about Alvarez's desire to purchase a Glock 19 handgun. Petitioner offered to purchase the firearm for Alvarez from a firearms dealer in Collinsville, Virginia, that offered discounts to police officers. Alvarez spoke with three licensed firearms dealers about how to conduct such a transaction. The dealers apparently told Alvarez that petitioner could purchase the firearm in Virginia and then transfer ownership to Alvarez at a licensed dealer in Pennsylvania. On November 15, 2009, Alvarez sent petitioner a check for $400 with "Glock 19 handgun" written in the memo line. Pet. App. 3a; C.A. J.A. 552-556.

On November 17, 2009, petitioner purchased a Glock 19 handgun and other items with cash from the dealer in Collinsville. During the transaction, petitioner completed a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Form 4473, which included several questions requiring a "Yes" or "No" response. Pet. App. 3a-4a; C.A. J.A. 585-590. Question 11.a. on the ATF Form 4473 asked:

> Are you the actual transferee/buyer of the firearm(s) listed on this form? *Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.*

Pet. App. 4a. Petitioner checked "Yes" in response to question 11.a. C.A. J.A. 585. On November 20, 2009, the $400 check from Alvarez was deposited in petitioner's bank account. The next day, petitioner transferred the Glock 19 handgun to Alvarez at a licensed federal firearms dealer in Easton, Pennsylvania. Alvarez gave petitioner a receipt confirming that Alvarez had purchased the Glock 19 handgun from petitioner for $400. Pet. App. 4a. Federal agents found and seized the receipt while executing a search warrant at petitioner's home after petitioner became a suspect in a bank robbery. *Id.* at 5a.

3. A federal grand jury in the Western District of Virginia returned a superseding indictment charging petitioner with one count of making a false statement material to the lawfulness of a firearm sale, in violation of 18 U.S.C. 922(a)(6); and one count of making a false statement with respect to information required to be kept in the records of a licensed firearms dealer, in violation of 18 U.S.C. 924(a)(1)(A). Pet. App. 5a-7a. Petitioner moved to dismiss both counts of the indict-

ment on the grounds that his "Yes" response to Question 11.a. on the ATF Form 4473 was not a material misrepresentation because his uncle was legally eligible to purchase a firearm. *Id.* at 8a; 7:10-cr-00068-GEC Docket entry No. (Docket entry No.) 44 (Mar. 10, 2011).

The district court denied the motion. Docket entry No. 50 (Mar. 14, 2011). The court concluded that "both counts of the indictment are legally sound" and that "if the government is able to prove what the grand jury has alleged in the indictment, * * * [petitioner] would be in violation of the[] two statutes" under which he was charged. Pet. App. 26a.

Petitioner later filed a second motion to dismiss, in which he argued that the "actual buyer" information requested by Question 11.a. on the ATF Form 4473 is not information that is required to be kept in the records of a federal firearms dealer and that the ATF's decision to require that information was made without proper notice and comment rulemaking. Pet. App. 8a-9a. The district court rejected those arguments in a published opinion. 778 F. Supp. 2d 678 (2011).

Petitioner entered a conditional guilty plea to both counts of the superseding indictment, preserving his right to raise his legal challenges to the indictment on appeal. Pet. App. 10a. The district court sentenced petitioner to five years of probation on each count, to run concurrently. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-24a. The court rejected petitioner's argument that the "actual buyer" information required by Question 11.a. on the ATF Form 4473 is only "material to the lawfulness of the sale" of a firearm, 18 U.S.C. 922(a)(6), if the person for whom the firearm is purchased is not eligible to purchase a firearm. The court held that "the identity of

the actual purchaser of a firearm is a constant that is always material to the lawfulness of a firearm acquisition under [Section] 922(a)(6)." Pet. App. 16a. Because it was clear from the record that the "sole reason" petitioner purchased the firearm was to transfer it to Alvarez, the court concluded that petitioner's statement on the ATF Form 4473 that he was the actual buyer of the Glock 19 handgun was a false statement material to the lawfulness of the sale under Section 922(a)(6). *Id.* at 17a.

The court of appeals acknowledged that the Fifth Circuit had concluded in *United States* v. *Polk*, 118 F.3d 286, cert. denied, 522 U.S. 988 (1997), that Section 922(a)(6) is not violated when a firearm purchaser falsely represents that he is the "actual buyer," but the true purchaser is also eligible to lawfully purchase a firearm. Pet. App. 14a-15a. The court of appeals, however, followed more recent decisions of the Sixth and Eleventh Circuits that have rejected *Polk*. See *id.* at 15a-16a (citing *United States* v. *Morales*, 687 F.3d 697 (6th Cir. 2012); *United States* v. *Frazier*, 605 F.3d 1271 (11th Cir. 2010)).

The court of appeals further upheld petitioner's conviction under Section 924(a)(1)(A). The court explained that the statute, which criminalizes making "any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter," 18 U.S.C. 924(a)(1)(A), "does not require that the falsehood on the ATF Form 4473 relate to the lawfulness of the firearm acquisition itself." Pet. App. 17a.

The court of appeals noted that petitioner did not appeal the denial of his second motion to dismiss, which had argued that the "actual buyer" information required

by Question 11.a. is not information that a dealer is required to keep in its records and that the ATF's decision to require that information was made without proper notice and comment rulemaking. Pet. App. 9a.

ARGUMENT

Petitioner contends (Pet. 7-19) that, because his uncle was not prohibited from purchasing a firearm, petitioner's representation on the ATF Form 4473 that he himself was the "actual buyer" of a Glock 19 handgun that he purchased on his uncle's behalf was not a false statement "material to the lawfulness of the sale" within the meaning of 18 U.S.C. 922(a)(6). The court of appeals correctly rejected that argument and its decision does not conflict with any decision of this Court. Although the court of appeals' decision conflicts with the Fifth Circuit's decision in *United States* v. *Polk*, 118 F.3d 286, cert. denied, 522 U.S. 988 (1997), the conflict does not warrant this Court's review. Petitioner further contends (Pet. 19-22) that he did not violate 18 U.S.C. 924(a)(1)(A) because the "actual buyer" question on the ATF Form 4473 is not information that is required to be kept in the records of a federal firearms dealer. The court of appeals properly upheld petitioner's Section 924(a)(1)(A) conviction and its decision does not conflict with any decision of this Court or another court of appeals. Further review of that claim is therefore unwarranted.

1. a. An individual purchasing a firearm must complete the ATF Form 4473, which requires him to certify that he is the "actual buyer" of the firearm and that he is legally entitled to purchase the firearm. See 27 C.F.R. 478.124. The "actual buyer" is the person who supplies the money and intends to possess the firearm. See *United States* v. *Nelson*, 221 F.3d 1206, 1209 (11th

Cir.), cert. denied, 531 U.S. 951 (2000). By contrast, a person who purchases a firearm at the direction of, and for use by, a third party is not the actual buyer but an agent of the third party known as a "straw purchaser." *Id.* at 1209-1210. The ATF Form 4473 warns the purchaser that "[y]ou are not the actual buyer if you are acquiring the firearm(s) on behalf of another person." C.A. J.A. 585 (emphasis omitted). The form also gives the following example: "Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is NOT THE ACTUAL TRANSFEREE/BUYER of the firearm and must answer "NO" to question 11.a." *Id.* at 588.

Under 18 U.S.C. 922(a)(6), it is unlawful for a firearms purchaser "knowingly to make any false or fictitious oral or written statement" that is "intended or likely to deceive" the dealer "with respect to any fact material to the lawfulness of the sale." A statement is "material" if it has a "tendency to influence" or is "capable of influencing" the action of a decision-maker. *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995). Because both federal and state law impose a variety of restrictions on who may lawfully purchase firearms, see 18 U.S.C. 922(b)(1)-(3) and (d), a firearms dealer must know the identity of the would-be purchaser to determine whether a sale is lawful. Few facts, if any, are more "material to the lawfulness of [a firearm] sale" than the buyer's identity. See *United States* v. *Buck*, 548 F.2d 871, 876 (9th Cir.), cert. denied, 434 U.S. 890 (1977); *United States* v. *Gudger*, 472 F.2d 566, 568 (5th Cir. 1972); *United States* v. *Crandall*, 453 F.2d 1216, 1217 (1st Cir. 1972).

Because petitioner purchased a Glock 19 handgun as an agent for his uncle and falsely represented that he

was himself the "actual buyer" of the firearm, he made a false statement that was material to the lawfulness of the sale in violation of Section 922(a)(6). The identity of the purchaser must be considered by the firearms dealer in determining whether the dealer may lawfully sell a firearm. A false statement about the identity of the purchaser is therefore material to the lawfulness of the sale.

b. That interpretation of Section 922(a)(6) is supported by this Court's decision in *Huddleston* v. *United States*, 415 U.S. 814 (1974). In *Huddleston*, the Court described Section 922(a)(6) as a provision that was "enacted as a means of providing adequate and truthful information about firearms transactions." *Id.* at 824-825. Explaining that the record-keeping required by the statute would help keep guns out of the hands of criminals, drug addicts, juveniles, and others whose possession of firearms is too dangerous to allow, the Court noted that "any false statement with respect to the eligibility of a person to obtain a firearm from a licensed dealer was made subject to a criminal penalty." *Id.* at 825. The Court's description of Section 922(a)(6) shows that it is not whether the purchaser is actually a prohibited person that matters for purposes of this provision. A false statement "with respect to the eligibility of a person" supports a reading that any fact that would help the dealer to determine the buyer's eligibility must be truthfully provided.

The legislative history of the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, confirms that interpretation. The House Report states that "[t]he requirement that one [who] obtains a firearm or ammunition from a Federal licensee must properly identify himself" is "inherent in th[e] prohibition" against making false statements

that are material to the lawfulness of a firearm sale. H.R. Rep. No. 1577, 90th Cong. 2d Sess. 13 (1968). Furthermore, requiring a gun purchaser to truthfully identify the actual buyer of a firearm furthers Congress's compelling interest in "protecting the integrity of official inquiries." *United States* v. *Rodgers*, 466 U.S. 475, 481 (1984) (quoting *Bryson* v. *United States*, 396 U.S. 64, 70-71 (1969)).

c. The court of appeals' decision is consistent with recent decisions of the Sixth and Eleventh Circuits. In *United States* v. *Frazier*, 605 F.3d 1271 (11th Cir. 2010), the defendant was convicted of aiding and abetting the making of false statements to a firearms dealer in violation of Section 922(a)(6). *Id.* at 1274. Although the defendant was himself eligible to purchase firearms, he directed Cassandra Davis and Welline Lubin to purchase firearms for him. *Id.* at 1275. Davis and Lubin represented on ATF Forms 4473 that they were the "actual buyers" of the firearms. *Ibid.* The court concluded that the false answers to the "actual buyer" question were material to the lawfulness of the firearms sale. *Id.* at 1279. The court explained:

> The identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under [Section] 922(a)(6). Thus, it can be reasoned that although the lawfulness of a sale may change depending on the identity of the purchaser, the fact that the identity of the purchaser is material to the lawfulness of the sale does not. Therefore, under [Section] 922(a)(6), Davis's and Lubin's false statements of the identity of the actual buyer satisfy the "fact material to the lawfulness of a sale" element, regardless of whether the actors were all lawfully eligible to purchase a firearm.

Id. at 1280 (internal citations omitted).

Similarly, in *United States* v. *Morales*, 687 F.3d 697 (6th Cir. 2012), the defendant stated on ATF Forms 4473 that he was the actual buyer of firearms that he was purchasing on behalf of someone else. *Id.* at 699. The defendant argued that he had not violated Section 922(a)(6) because the actual buyer was also eligible to purchase firearms, and his false statements were therefore not material to the lawfulness of the transactions. *Ibid.* Following the Eleventh Circuit's decision in *Frazier*, the court held that the identity of the actual buyer is material to the lawfulness of a firearm sale regardless of whether the actual buyer is eligible to purchase a firearm. *Id.* at 701. The court explained that the identity of the purchaser is "central to the determination of his eligibility or ineligibility to purchase a firearm" and that even where the actual purchaser is eligible to purchase a firearm, "his identity is no less material to the lawfulness of the transaction" than if he were ineligible. *Ibid.*

As petitioner points out (Pet. 9-10), the Fifth Circuit reached the opposite conclusion in *Polk*, *supra*. In *Polk*, the defendant asked Douglas Davidson, a confidential informant, to purchase various firearms for him. 118 F.3d at 289. The defendant was charged with aiding and abetting violations of Section 922(a)(6) after Davidson made the purchases while falsely representing that he was the actual buyer. *Id.* at 294-295. The court concluded that the defendant did not aid and abet a violation of Section 922(a)(6) by asking Davidson to purchase firearms for him. *Id.* at 295. The court explained that the defendant was himself eligible to purchase firearms, and the court concluded that Davidson's false statements about the identity of the actual pur-

chaser therefore were not material to the lawfulness of the transactions. *Ibid.* The court stated:

> [T]he plain language of the statute compels the conclusion * * * that [Section] 922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the "*lawfulness of the sale*" of firearms. Thus, if the true purchaser can lawfully purchase a firearm directly, [Section] 922(a)(6) liability (under a "straw purchase" theory) does not attach.

Ibid.

Polk was wrongly decided. The Fifth Circuit's construction of Section 922(a)(6) disregards the word "material" in that provision. Section 922(a)(6) does not bar unlawful firearm sales. It bars any false statement that is "material" to a determination of whether the sale is lawful. Thus, as the Eleventh Circuit explained in *Frazier*, "[t]o say that the identity of the actual purchaser is material to the lawfulness of [the] sale" when the actual purchaser is ineligible to purchase a firearm, but not when the actual purchaser is eligible to purchase a firearm, "is counterintuitive." 605 F.3d at 1280. As the Eleventh Circuit explained, *Polk* incorrectly "focused on whether one's identity affected the lawfulness of a sale," when the inquiry under Section 922(a)(6) is instead "whether one's identity is a fact that is material to the lawfulness of a sale." *Ibid.*

Although the decision in *Polk* conflicts with the court of appeals' decision in this case and the decisions of other courts of appeals, the conflict does not warrant this Court's review. *Polk* was decided in 1997, approximately 16 years ago. It has not been followed by any other court of appeals, and it has been rejected by three recent court of appeals decisions. Given that repudia-

tion, and given that the Fifth Circuit in *United States* v. *Ortiz-Loya*, 777 F.2d 973 (1985), upheld a Section 922(a)(6) conviction where the actual buyer appears to have been eligible to purchase a firearm, see *id.* at 981 (upholding Section 922(a)(6) conviction where actual buyer was apparently eligible to purchase firearms but used straw purchasers in part because he had left his Texas driver's license in Mexico), review by this Court should be postponed until the Fifth Circuit has a chance to reconsider its precedent in light of recent decisions. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").*

d. Petitioner and his amici raise two additional challenges to Question 11.a. on the ATF Form 4473. They contend (Pet. 17; Br. of Amicus Curiae NRA Civil Rights Defense Fund (NRA Amicus Br.) 19-28) that the ATF's position that straw purchases are illegal without regard to the eligibility of the buyer, reflected in Question 11.a., was adopted without proper notice and comment rulemaking. They further contend (Pet. 17; NRA Amicus Br. 10-11; Br. of Amicus Curiae Congressman Steve Stockman *et al.* (Stockman Amicus Br.) 17-18) that Question 11.a. is arbitrary because it states that the purchaser is the "actual buyer" of a firearm if he intends to give the firearm to another person as a gift, but not if

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* Contrary to petitioner's contention (Pet. 10-11), the decision below does not conflict with the Ninth Circuit's decision in *United States* v. *Moore*, 109 F.3d 1456 (en banc), cert. denied, 522 U.S. 836 (1997). In *Moore*, the Ninth Circuit upheld the Section 922(a)(6) conviction of a straw purchaser and the mother of a 14-year-old (and thus ineligible) buyer who assisted the straw purchaser in buying a firearm for her son. Because one of the buyers was not eligible to purchase a firearm, *Moore* did not squarely address the question presented.

he is purchasing the firearm on another person's behalf. See C.A. J.A. 588.

Neither of these arguments was raised in the court of appeals. See Pet. App. 9a & n.6 (explaining that petitioner had pointed out administrative deficiencies in the ATF Form 4473 in the district court but did not renew those arguments before the court of appeals). This Court ordinarily does not consider issues that were not pressed or passed upon below, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992), and nothing justifies a departure from that practice in this case.

The arguments are also without merit. The "straw purchaser" theory of liability that underlies Question 11.a. on the ATF Form 4473 was not created by the ATF. Rather, the courts of appeals have explained that the doctrine follows from the statutory requirement that a dealer ascertain the identity of a gun purchaser. See, *e.g.*, *Nelson*, 221 F.3d at 1209 ("If an ineligible buyer could simply use a 'straw man' or agent to obtain a firearm from a licensed dealer, the statutory scheme would be too easily defeated."); *United States* v. *Lawrence*, 680 F.2d 1126, 1128 (6th Cir. 1982) (affirming a straw purchase conviction under Section 922(a)(6) and stating that "[i]f sales such as this one were insulated from the law's registration provisions, the effect would be tantamount to a repeal of those provisions").

As explained above, pp. 6-12, *supra*, Section 922(a)(6) criminalizes all false statements that are material to the lawfulness of a firearm sale, including falsely identifying oneself as the actual buyer of a firearm when one is actually purchasing it on behalf of someone else. It is thus irrelevant that Congress has not made it a crime for an eligible firearm purchaser to transfer a firearm to another eligible purchaser. See Pet. 14; NRA Amicus

Br. 6-8, 14; Stockman Amicus Br. 19-21. It is Section 922(a)(6) that prohibits petitioner's conduct, and Question 11.a. implements that statutory provision.

Furthermore, the fact that the ATF Form 4473 considers a gift-giver to be the actual purchaser of a firearm is not an arbitrary distinction. A person who purchases a firearm as a gift for another person is not acting as the recipient's agent, which is the premise underlying the straw-purchaser theory. See *Nelson*, 221 F.3d at 1209. And as a practical matter, a prohibited person is more likely to obtain a firearm through a planned straw purchase than an unanticipated or unrequested gift.

In the court of appeals, petitioner's challenge to his Section 922(a)(6) conviction was limited to whether a false answer to Question 11.a. on the ATF Form 4473 was material to the lawfulness of a firearm sale when the actual buyer is eligible to purchase a firearm. That question does not warrant this Court's review and petitioner's other arguments were not properly presented in this case.

2. Petitioner further contends (Pet. 19-22) that he did not violate Section 924(a)(1)(A) because the "actual buyer" information requested by Question 11.a. on the ATF Form 4473 is not information that is required to be kept in the records of a federal firearms dealer. Further review of petitioner's Section 924(a)(1)(A) conviction by this Court is not warranted.

a. As an initial matter, petitioner did not raise this argument in the court of appeals. Although petitioner argued to the district court in a motion to dismiss that the "actual buyer" of a firearm is not information that is required to be kept in the records of a federal firearms

dealer under Section 924(a)(1)(A), petitioner did not appeal the denial of that motion, Pet. App. 9a & n.6.

Petitioner's challenge to his Section 924(a)(1)(A) conviction in the court of appeals was coextensive with his materiality challenge to his Section 922(a)(6) conviction. See Pet. C.A. Br. 11-22; *id.* at 11 (stating that "[s]ince the facts and the application of the law[] are so intertwined with [Section 922(a)(6) and Section 924(a)(1)(A)], they will both be addressed in this section"); *id.* at 12 n.2 (stating that references to Section 922(a)(6) in petitioner's court of appeals brief "are also intended to apply to [petitioner's] conviction under 18 U.S.C. § 924(a)(1)(A)"). Accordingly, the court of appeals affirmed petitioner's Section 924(a)(1)(A) conviction on the grounds that the provision "does not require that the falsehood on the ATF Form 4473 relate to the lawfulness of the firearm acquisition itself." Pet. App. 17a.

Nowhere in his court of appeals brief does petitioner argue that the "actual buyer" information required on the ATF Form 4473 is not information that is required to be kept in the records of a federal firearms dealer for purposes of Section 924(a)(1)(A). This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." *Williams*, 504 U.S. at 41 (internal quotation marks and citation omitted). The Court should adhere to that rule here.

b. In any event, all of the information on ATF Form 4473 is information that is required to be kept in the records of a federal firearms dealer. A federal firearms dealer is required by statute to record the "name, age, and place of residence" of every individual to whom the dealer sells a firearm. 18 U.S.C. 922(b)(5). The dealer must maintain records of firearm sales "at his place of

business for such period, and in such form, as the Attorney General may by regulations prescribe." 18 U.S.C. 923(g)(1). The Attorney General has promulgated a regulation that requires a federal firearms dealer to record firearms sales transactions on the ATF Form 4473, 27 C.F.R. 478.124(a), and the form requires the purchaser to certify that he is the actual buyer as part of the dealer's collection of the name and other identifying information of the purchaser. See 27 C.F.R. 478.124(b); *United States* v. *Johnson*, 680 F.3d 1140, 1147 (9th Cir. 2012).

The courts of appeals that have considered the question have concluded that the "actual buyer" information required by the ATF Form 4473 is information required to be kept in the records of a federal firearms dealer within the meaning of Section 924(a)(1)(A). See *Johnson*, 680 F.3d at 1147; *United States* v. *Soto*, 539 F.3d 191, 198-199 (3d Cir. 2008), cert. denied, 555 U.S. 1116 (2009); *Nelson*, 221 F.3d at 1209. Petitioner identifies no case adopting his view that it is not. Further review of that issue is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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IN THE
Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

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September 9, 2013

ARGUMENT

I. THE DEEP CIRCUIT SPLIT ON THE FIRST QUESTION PRESENTED CAN BE RESOLVED ONLY BY THIS COURT.

As the government concedes in its brief, there is a split among the circuits on the proper interpretation of 18 U.S.C. § 922(a)(6) and the court-created straw purchaser doctrine. Br. in Opp. 6, 11. But the government suggests this issue does not warrant review for two reasons. First, the government contends that the Fifth Circuit's decision in *Polk* "was decided in 1997, approximately 16 years ago" and "has not been followed by any other court of appeals." Br. in Opp. 11. Second, the government states that a 1985 decision by the Fifth Circuit "appears" to conflict with *Polk* and thus "review by this Court should be postponed until the Fifth Circuit has a chance to reconsider its precedent in light of" the decisions in other circuits. Br. in Opp. 11-12. These arguments are flawed.

First, the Fifth Circuit will never have an opportunity to reconsider its decision. Under *Polk*, a federal prosecutor in the Fifth Circuit cannot charge someone in Abramski's situation under § 922(a)(6), where the ultimate recipient of the gun is a lawful purchaser. Thus, the issue will not be presented to the Fifth Circuit again.

Second, the government has manufactured an intra-circuit split between *Polk* and *United States v. Ortiz-Loya*, 777 F.2d 973 (5th Cir. 1985) where no conflict actually exists. Br. in Opp. 11-12. The

government states that *Ortiz-Loya* upheld a § 922(a)(6) conviction where "the actual buyer *appears* to have been eligible to purchase a firearm." Br. in Opp. 12 (emphasis added). But in framing this argument, the government simply *assumes* that the recipient of the gun could lawfully purchase it because he had a Texas driver's license that he mistakenly left in Mexico. *Id.* But many people who have a driver's license are nevertheless prohibited from buying guns, such as 16-year-olds, convicted felons, and habitual drug users. *See* 18 U.S.C. § 922(b), (d). The Fifth Circuit in *Ortiz-Loya* did not address whether the ultimate recipient in that case was a lawful purchaser and there simply is no way to know from the decision. Thus, the cases are not in conflict.

The government also downplays the significance of the circuit split on this issue. Other circuits, where this issue has not yet been addressed, continue to recognize the vitality of this persistent split. *See, e.g., United States v. Bryant*, No. 13-CR-14, 2013 WL 3423275, at *6 (E.D. Wis. July 8, 2013) ("[T]he law is not settled that where the government prosecutes under a straw buyer theory that the actual buyer must also be a prohibited buyer . . ."). The fact that the Fifth Circuit addressed this issue a decade and a half before the Fourth, Sixth, and Eleventh Circuits says nothing about which side's reasoning is likely to be followed in these other courts.

Moreover, the government dismisses the Ninth Circuit's *en banc* decision in *United States v. Moore*, 109 F.3d 1456, 1461 (9th Cir. 1997), because

"one of the buyers was not eligible to purchase a firearm" and thus "*Moore* did not squarely address the question presented." Br. in Opp. 12. But the majority of the *en banc* Ninth Circuit stated that, if the defendant had proved the gun was purchased for the lawful recipient (and not the unlawful one), the conviction would have been reversed. *Moore*, 109 F.3d at 1461. As a majority of the active judges of the Ninth Circuit explained, § 922(a)(6) applies only "when a lawful purchaser buys for an unlawful one." *Id.* This is strong confirmation that the Ninth Circuit agrees with *Polk*'s reasoning.

Finally, the government devotes several pages of its brief to the merits of this issue. The government contends that "[f]ew facts, if any, are 'more material to the lawfulness of [a firearm] sale' than the buyer's identity." Br. in Opp. 7.

The government's position underscores why this Court's review is necessary. Abramski *did* provide the buyer's identity—he was the buyer. When he later sold the gun to his uncle at another licensed gun dealer, his uncle was the buyer. And at all times, the government possessed the information required to be provided by law about who owned the gun and where that person could be located. Pet. 5-6.

Nothing in the federal firearm statutes or the ATF regulations required anything more from Abramski. More important, even if Abramski had told the gun dealer that he intended to later resell the gun to his uncle, the dealer still could have lawfully sold Abramski the gun. Pet. 18. Thus,

Abramski's answer to the "actual buyer" question was not material to the lawfulness of the sale.

The government's position requires the Court to go beyond the firearm statutes and regulations and apply the court-created straw purchaser legal fiction—in other words, to conclude that Abramski was not the "actual buyer" of the gun because he intended to resell it to his uncle. As discussed in detail in the petition, Pet. 15-18, that legal fiction was created by courts to close a perceived loophole in the firearm statutes that permitted ineligible persons to readily obtain guns. Whatever the merits of the straw purchaser fiction in that circumstance, it simply cannot be applied in a case like this one, where both Abramski and his uncle lawfully could buy and possess a firearm.

In sum, the Court should grant review in this case to resolve this persistent circuit split and provide clarity to the lower courts concerning the congressional intent of this frequently-used criminal firearm statute.

II. BOTH QUESTIONS PRESENTED INVOLVE THE SAME LEGAL ISSUE AND THIS COURT SHOULD REVIEW THEM BOTH.

The government also argues that this Court should decline review of the second question presented for two reasons, both of which are similarly flawed. First, the government asserts that "petitioner did not raise this argument in the court of appeals." Br. in Opp. 14-15. This is simply wrong. To be sure, Abramski abandoned his Administrative

Procedure Act challenge to § 924(a)(1)(A), as the Fourth Circuit pointed out in a footnote. Pet App. 9a & n.6. But Abramski preserved the § 924(a)(1)(A) challenge raised in this petition. *See* Fourth Circuit Appellant's Br. 17. More important, the Fourth Circuit expressly considered, and rejected, this argument in its decision. Pet. App. 17a-18a. Thus, the issue was "passed upon" by the lower court and is not waived regardless of whether Abramski included it in his briefs below. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (stating that the Court's traditional rule permits "review of an issue not pressed so long as it has been passed upon").

Next, the government argues that there is no circuit split on this issue. But the government also concedes that "Petitioner's challenge to his Section 924(a)(1)(A) conviction in the court of appeals was coextensive with his materiality challenge to his Section 922(a)(6) conviction." Br. in Opp. 15. Because both issues turn entirely on the Fourth Circuit's erroneous application of the straw purchaser doctrine, any decision by this Court reversing the Fourth Circuit's interpretation of § 922(a)(6) would necessarily invalidate its interpretation of § 924(a)(1)(A).

Thus, the Court should grant certiorari on these interrelated straw purchaser doctrine questions so that it may squarely address both. *See Blumenthal v. United States*, 332 U.S. 539, 541 (1947) (recognizing that with a grant of certiorari the Court may accept review of other "inseparably connected" issues). Otherwise, Abramski may be faced with the injustice of having prevailed on his

legal arguments but nevertheless left to serve out his sentence for a felony conviction that this Court's decision would otherwise render invalid.

CONCLUSION

For the reasons stated in the petition and this reply brief, the Court should grant the petition for a writ of certiorari.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1493

FILED
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In The

Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE NRA CIVIL RIGHTS DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Bureau of Alcohol, Tobacco, Firearms and Explosives exceeded its statutory authority by criminalizing otherwise perfectly lawful conduct by simply amending a form – without notice and rulemaking – that firearms purchasers fill out when purchasing a firearm.

2. Whether the Bureau of Alcohol, Tobacco, Firearms and Explosives improperly adopted legislative rules redefining straw-purchases, federal firearm licensees transferring firearms to persons who are not "actual purchasers," and requiring transferees to certify that they are in fact actually buyers, all without notice and comment.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The NRA Civil Rights Defense Fund assists in the defense of the constitutional right to keep and bear arms by providing legal and financial assistance in cases relating to said right. It has a compelling interest in this case because BATFE prohibits lawful conduct.

SUMMARY OF ARGUMENT

In 1995, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE") added Question 11.a. to Form 4473, the effect of which was to criminalize the legal transfer of firearms between non-prohibited persons. There is no statutory authority for this prohibition and it violates the plain intent of Congress in passing the Gun Control Act of 1968 ("GCA").

[1] No counsel for any party authored this brief in whole or in part, nor made a financial contribution for the preparation or submission of this brief. Funding for printing and submission of this brief was provided solely by the Fund. This brief is filed with the written consent of all parties, reflected in letters filed by the parties with the clerk. Amicus complied with the conditions of those consents by providing timely notice of its intention to file this brief.

ARGUMENT

I. BATFE'S PROHIBITION OF THE TRANSFER BY A NON-PROHIBITED PERSON TO ANOTHER NON-PROHIBITED PERSON, IS NOT A PERMISSIBLE CONSTRUCTION OF THE GUN CONTROL ACT.

A. Congress' plain intent in enacting the GCA was to prevent the transfer of firearms to certain "prohibited" persons.

The GCA contains a list of persons who are prohibited from possessing firearms and ammunition and to whom it is unlawful for firearms or ammunition to be transferred or delivered to. 18 U.S.C. §§922(d) and (g). Specifically, §922(d) prohibits the transfer of firearms to "prohibited persons," such as convicted felons, certain misdemeanants, persons adjudicated mentally incompetent, persons involuntarily committed to mental institutions, etc. 18 U.S.C. §922(d).

> Congress . . . sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous. These persons are comprehensively barred by the Act from acquiring firearms by any means. Thus, §922(d) prohibits a licensee from knowingly selling or otherwise disposing of any firearm . . . to the same categories of potentially irresponsible persons.

Barrett v. United States, 423 U.S. 212, 218 (1976). "Similarly, §922(g) prohibits the same categories of

potentially irresponsible persons" from possessing firearms. *Id.*

The GCA also prohibits making a "false or fictitious oral or written statement . . . intended or likely to deceive [a firearms dealer] with respect to any fact material to the lawfulness of the sale or other disposition of such firearm. . . ." 18 U.S.C. §922(a)(6). The GCA also criminalizes knowingly making "any false statement . . . with respect to the information required by this chapter to be kept in the records of a" federal firearms dealer. 18 U.S.C. §924(a)(1)(A).

Congress stated its intent in the GCA's preamble:

> Congress hereby declares that . . . it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms . . . and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulation of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.

Gun Control Act of 1968, §101, pmbl., 82 Stat. 1213 (1968).

In enacting the provisions which are the subject of this case, Congress was concerned with the availability of firearms "to those whose possession thereof was contrary to the public interest." *Huddleston v. United States*, 415 U.S. 814, 824 (1974). Congress passed the GCA because of a

> concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons. Its broadly stated principal purpose was 'to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.' S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968).

Barrett, 423 U.S. at 220. "The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.' S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968)." *Huddleston*, 415 U.S. at 824.

Congressman Celler referenced "the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses, from buying, owning, or possessing firearms. This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons." 114 Cong. Rec. 13647 (1968).

Congress was concerned with "distinguishing between law-abiding citizens and those whose possession of weapons would be contrary to the public interest." *Huddleston*, 415 U.S. at 829. "The Act . . . thus contemplates interference with the ownership of weapons when those weapons fall into the hands of juveniles, criminals, drug addicts, and mental incompetents." *Id.*

Congress did not intend to *per se* prohibit the purchase of a firearm by an individual on behalf of another. Until 1995, even BATFE held the position that a purchase by a non-prohibited person for another non-prohibited person was lawful and did *not* constitute a straw-purchase. *See infra* Part I.C.

The GCA "pointedly and simply provides that it is unlawful for four categories of persons, including a convicted felon, 'to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.' The quoted language is without ambiguity. It is directed unrestrictedly at the felon's receipt of any firearm. . . ." *Barrett*, 423 U.S. at 216.

Congress' intent was *not* to prevent transfers of firearms between persons who are *both legally entitled to purchase the firearm*. Rather, Congress desired to prevent individuals from purchasing firearms on behalf of prohibited persons.

"Congress knew the significance and meaning of the language it employed" in this section of the GCA. *Id.* at 217. "[T]here is no ambiguity in the words of

§922(h), and there is no justification for indulging in uneasy statutory construction." *Id.* Effect should be given to Congress' intent.

B. Form 4473 prohibits and criminalizes conduct that Congress did not prohibit.

The Attorney General has the authority to "prescribe only such rules and regulations as are necessary to carry out the provisions of" the GCA. 18 U.S.C. §926(a).

Form 4473, which was not subject to notice and comment rulemaking, states that "[t]he information you provide will be used to determine whether you are prohibited under law from receiving a firearm." Bureau of Alcohol, Tobacco, Firearms and Explosives, ATF Form 4473 (5300.9), Part I (2012) (available at http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf).

Form 4473 has historically included a plethora of questions used to identify the transferee (including name, address, place of birth, height, weight, gender, birth date, SSN, and ethnicity) and questions used to determine whether or not the transferee was a prohibited person (listing the disqualifications set forth in §§922(d) and (g)).

However, in 1995 BATFE added a new question to Form 4473. *United States v. Dollar*, 25 F.Supp.2d 1320, 1325 n.6 (1998). Question number "11.a." now asks: "Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning: You are not**

the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." ATF Form 4473, at 1 (emphasis original).

Form 4473 informs: "you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself. . . ." *Id.* at 4. The form then provides an example of a prohibited transaction: "Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer "NO" to question 11.a. The licensee may not transfer the firearm to Mr. Jones." *Id.*

If an individual purchasing a firearm on behalf of another answers "no" to Question 11.a., the sale will be denied when the firearms dealer calls in to have the transfer approved. "If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." *Id.* at 1.

Thus, despite the fact that Congress never prohibited, nor intended to prohibit, the transfer of a firearm by one non-prohibited individual to another non-prohibited individual, Form 4473 prohibits such a lawful transfer.

Furthermore, if the transferee answers "yes" (indicating that he *is* the actual buyer) and then transfers the firearm to the other non-disqualified

individual, he may be charged: (1) with a felony for violating §922(a)(6), for making a false statement that is "material to the lawfulness of the sale," and/or (2) with a felony for violating §924(a)(1)(A), for knowingly making a false statement "with respect to the information required . . . to be kept" by a firearms dealer. 18 U.S.C. §922(a)(6) and §924(a)(1)(A).

This Court has stated that "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). Further, the Administrative Procedure Act, 5 U.S.C. §500 et seq. ("APA") forbids federal agencies from promulgating regulations "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §706(2)(C).

The intent and result of Question 11.a. is to prevent a person who is legally entitled to purchase a firearm from purchasing a firearm on behalf of another person who is *also* legally entitled to purchase the firearm. This goes far beyond the intent of Congress to prevent transfers of firearms to persons who are prohibited under the GCA. Question 11.a. criminalizes transfers between individuals who are not prohibited persons.

C. BATFE is inconsistent and nonsensical in its application of this non-statutorily authorized prohibition.

"The term 'straw-purchase' is not defined in either the United States Code or the Code of Federal Regulations. It is in fact a judicially created doctrine. . . ." *Dollar*, 25 F.Supp.2d at 1322.

BATFE's current position is contrary to the position it previously took. The government long advised gun buyers that the straw-purchaser doctrine only applied when "the purchaser of record is merely being used to disguise the actual sale to another person, who could not personally make the purchase or is prohibited from receiving or possessing a firearm." *Id.* at 1324 (quoting Federal Regulations of Firearms and Ammunition, ATF P 5300.12 (1980)).

BATFE first defined "straw-purchaser" in its 1980 Industry Circular 79-10, stating that a purchase by a non-prohibited person for another non-prohibited person was lawful and did *not* constitute a straw-purchase. *Dollar*, 25 F.Supp.2d at 1323.

> The Gun Control Act of 1968 does *not* necessarily prohibit a dealer from making a sale to a person who is actually purchasing the firearm for another person. *It makes no difference that the dealer knows that the purchaser will later transfer the firearm to another person, so long as the ultimate recipient is not prohibited from receiving or possessing a firearm*. . . . What the Act forbids is the sale or delivery of a firearm to a person the

> licensee knows or has reason to believe is a person to whom a firearm may not be sold (e.g., a nonresident or a felon) or to a person the licensee knows will transfer the firearm to a person prohibited from receiving or possessing it.

Federal Regulations of Firearms and Ammunition, ATF P 5300.12, 24 (1980) (emphasis added).

BATFE's definition of "straw-purchase" was not changed in subsequent ATF publications in 1984 and 1988. Federal Firearms Regulations 1984-85; Federal Firearms Regulations 1988-89.

Without any basis in law, BATFE changed its position and made what it previously asserted was a perfectly lawful act, into a new prohibition.

In *Polk*, the Fifth Circuit noted the change in BATFE's "straw-purchase" warning in Form 4473. *United States v. Polk*, 118 F.3d 286, 295 n.7 (5th Cir. 1997). The Court noted that the August 1994 version of Form 4473 "significantly broadens the definition of 'straw-purchase,'" by dispensing, for the first time, the requirement that the ultimate recipient be a prohibited person. *Id.*

Furthermore, BATFE is inconsistent in the application of its new statutorily unauthorized prohibition. While Form 4473 now prohibits the transfer of firearms purchased by a non-prohibited person to another non-prohibited person in all cases, BATFE states that in some cases, such transfers are not prohibited.

Form 4473 states that "[i]f you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." ATF Form 4473, Question 11.a, at 1. However, in the Instructions portion of Form 4473, BATFE creates exceptions to this black letter rule:

> Question 11.a. Actual Transferee/Buyer: . . . you are the actual transferee/buyer if you are purchasing the firearm for yourself. . . . *You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party.* ACTUAL TRANSFEREE/BUYER EXAMPLES: Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is NOT THE ACTUAL TRANSFEREE/BUYER of the firearm and must answer "NO" to question 11.a. The licensee may not transfer the firearm to Mr. Jones. *However, if Mr. Brown goes to buy a firearm with his own money to give to Mr. Black as a present, Mr. Brown is the actual transferee/buyer of the firearm and should answer "YES" to question 11.a.* . . .

ATF Form 4473, "Notices, Instructions and Definitions," at 4 (emphasis added).

Thus, BATFE creates an exception to the prohibition for "gifts." Like the prohibition itself, this exception is not found anywhere in the GCA, and is created entirely by ATF Form 4473.

Furthermore, in the most recent edition of BATFE's *Federal Firearms Regulations Reference*

Guide ("*Reference Guide*"), BATFE states, in pertinent part, in the Questions and Answers section: "(B14) May a parent or guardian purchase firearms or ammunition as a gift for a juvenile (less than 18 years of age)? Yes." Federal Firearms Regulations Reference Guide, ATF P 5300.4, Sec. IV.C, Question B-14,179 (2005).

Thus, Mr. Brown can buy a firearm "with his own money to give to Mr. Black as a present," and a parent or guardian may purchase a firearm for a juvenile. However, in the instant case, purchasing a firearm for an uncle is a felony. There is no obvious difference why the law should treat these situations differently, and there certainly is no statutory basis to treat them differently.

D. The discretion afforded an administrative agency is not unlimited, and does not include prohibiting and criminalizing conduct that Congress specifically chose not to criminalize.

While an administrative agency is afforded discretion, this discretion is not unlimited. Rules and regulations that comply with APA's rule making requirements, including notice and comment, are afforded a high level of deference. The framework of deference set forth in *Chevron* applies to an agency interpretation contained in a properly promulgated regulation. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). However, even in these cases, the deference is not absolute. *See generally Chevron*.

Form 4473 was not promulgated in compliance with APA's rule making requirements. Agency actions that are not subject to APA's rule making requirements are afforded a lesser deference. *See Reno v. Koray*, 515 U.S. 50, 61 (1995). Such agency actions are "entitled [only] to some deference." *Reno*, 515 U.S. at 61 (citing *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157, (1991)). Agency interpretations, opinion letters, policy statements, agency manuals, enforcement guidelines, etc. do not warrant Chevron-style deference. *Christensen*, 529 U.S. at 587. They are "entitled to respect," but only to the extent that they are persuasive, which is not the case in relation to Question 11.a of Form 4473. *Id.*

For instance, Courts use a lower standard of deference when reviewing an administrative agency's interpretations. *See Vance v. Ball State Univ.*, No. 11-556, slip op. at 9, n.4 (2013); and *Univ. of Texas Southwestern Medical Center v. Nassar*, No. 12-484, slip op. at 20-21 (2013) (rejecting EEOC guidance manual's definitions).

Just because an agency believes that a statute should have included language to extend a 10-day trading suspension period, does not mean that the agency can do so. *SEC v. Sloan*, 436 U.S. 103 (1978). The suspension time "cannot be judicially or administratively extended simply by . . . arguments as to the need for a greater duration of suspension orders. . . . If extension of the summary suspension power is desirable, the proper source of that power is Congress."

Id. at 117. "[H]ad Congress intended the Commission to have the power to summarily suspend trading virtually indefinitely we expect that it could and would have authorized it more clearly than it did in" the statute. *Id.* at 122.

Likewise, if Congress had intended to prohibit transfer of firearms between two non-prohibited persons, it would have added such a prohibition to §§922(d) and (g), but it did not. The validity of agency actions are especially important in a criminal case, such as this, which exposes citizens to felony convictions. BATFE exceeded its statutory authority by prohibiting, via Form 4473, that which Congress did not prohibit.

E. This Court has previously refused to read exclusions into the GCA.

This Court has rejected attempts to read into the GCA exclusions, to prohibited transfers, that are not found in the plain language of the GCA. "Had Congress' desire been to exempt a transaction of this kind, it would have artfully worded the definition so as to exclude it." *Huddleston*, 415 U.S. at 822.

Neither should BATFE be allowed to add a new prohibition into the GCA that does not exist. "[T]here is nothing else in the statute that justifies [such an] imposition." *Id.* at 820.

F. The Fifth and Ninth Circuits support the conclusion that Form 4473 conflicts with the plain intent of Congress.

The Fifth and Ninth Circuits support the conclusion that Form 4473 effectively prohibits transactions that Congress did not intend to prohibit. *Polk*, 118 F.3d at 295 and *United States v. Moore*, 109 F.3d 1456, 1460 (9th Cir. 1997).

In *Polk*, Davidson purchased firearms on behalf of Polk. Polk was charged with making false statements to a licensee in the acquisition of a firearm. *Polk*, 118 F.3d at 291. Polk argued that the purchases "were not 'straw-purchases' because Polk had every right to purchase firearms (i.e., he was not an unlawful purchaser through Davidson)." *Id.* at 295. The Government argued that "Davidson's purchases were 'straw-purchase' transactions because, notwithstanding the fact that Polk could lawfully purchase firearms, Davidson falsely informed a federally licensed firearms dealer that he was the true purchaser. . . ." *Id.*

The Fifth Circuit held that "the Government's construction of §922(a)(6) sweeps too broadly. . . ." *Id.*

The Court admitted that it had previously held that straw-purchases may violate §922(a)(6). "Although §922(a)(6) on its face does not prohibit 'straw-purchases,' we have nonetheless held that such transactions violate §922(a)(6). *See, e.g., United States v.*

Ortiz-Loya, 777 F.2d 973, 979 (5th Cir. 1985)." *Id.* at 295. However:

> It is clear to us – indeed, the plain language of the statute compels the conclusion – that §922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the 'lawfulness of the sale' of firearms. . . . Thus, *if the true purchaser can lawfully purchase a firearm directly, §922(a)(6) liability* (under a 'straw-purchase' theory) *does not attach.*

Id. (emphasis added).

The Court also admitted that it had previously held that "the mere making of a false statement on ATF Form 4473 triggers §922(a)(6) liability." *Id.* n.8. Again the Court distinguished:

> However, these cases do not compel a different result here because *in each of those cases, the person signing the form was a convicted felon and lied about that fact.* In other words, the defendants' failure to state that they were convicted felons made the sale unlawful. *By contrast, in this case, it is undisputed that CI Davidson could have lawfully purchased weapons from a federally licensed firearms dealer.*

Id. (emphasis added).

In *Moore*, the Ninth Circuit also held the view that the "straw-purchase" of a firearm, where both individuals are not disqualified and could lawfully

have purchased the firearm, does not violate §922(a)(6). 109 F.3d at 1461. *See also Perri v. Department of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981) (a "strawman" purchase occurs "when a lawful purchaser buys for an unlawful one").

The government argued that defendant Wiley engaged in a strawman purchase of a firearm on behalf of a prohibited minor. *Moore*, 109 F.3d at 1460. The issue was whether Wiley had purchased the firearm on behalf of the minor, Bobby Moore, or on behalf of Moore's mother, Mary Moore, who was not a prohibited minor.

The Court reasoned that the "strawman" doctrine was "nothing more than a long-standing construction of the relevant statutes," and that "a person violates section 922(a)(6) by acting as an intermediary or agent of someone who is ineligible to obtain a firearm from a licensed dealer and making a false statement that enables *the ineligible principal* to obtain a firearm." *Id.* at 1460-61 (emphasis added). "[S]ham or strawman purchases occur when a lawful purchaser buys for an unlawful one." *Id.* (quoting *Perri v. Department of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981) (internal citations omitted). *See also United States v. Lawrence*, 680 F.2d 1126, 1127-28 (6th Cir. 1982) (defendants who purchase firearms for ineligible foreign citizens violate section 922(a)(6)); *United States v. Ortiz-Loya*, 777 F.2d 973, 978 (5th Cir. 1985) (same)); *United States v. Howell*, 37 F.3d 1197, 1202 (7th Cir. 1994) (the essence of a straw-purchaser case is "'an eligible purchaser who is

acting as an agent, intermediary, or 'straw-purchaser' for someone' who is ineligible to purchase the firearm directly," quoting *Ortiz-Loya*, 777 F.2d at 979).

The Court quoted with approval the District Court's statement that "Wiley was an archetypical strawman. He was recruited and compensated for his role because Bobby could not buy the coveted firearm. . . ." *Moore*, 109 F.3d at 1462. Because Moore, as a juvenile, was a prohibited person under federal law, Wiley would be making the purchase on behalf of a prohibited person; and preventing purchases on behalf of prohibited persons *was* Congress' intent in passing the GCA. *Id.* at 1462-63.

Thus, while the Ninth Circuit affirmed the conviction, it holds that §922(a)(6) does not apply to straw-purchases where the ultimate recipient of the firearm is not prohibited.

The Fifth Circuit in *Polk* and the Ninth Circuit in *Moore, Perri, Lawrence*, and *Ortiz-Loya* all demonstrate that criminalizing such a transfer flies in the face of the Congressional intent of the GCA.

G. This case presents a five-circuit split.

The Fourth Circuit joined the Sixth and Eleventh Circuits in rejecting the reasoning of *Polk* and *Moore*. *See United States v. Morales*, 687 F.3d 697, 701 (6th Cir. 2012) and *United States v. Frazier*, 605 F.3d 1271, 1281 (11th Cir. 2010). There exists a split of authority on whether a felony is committed when a

non-prohibited person purchases a firearm for another non-prohibited person. This exposes well intentioned citizens, who are not prohibited persons, to the danger of felony prosecution, in some jurisdictions but not in others, for conduct that Congress did not criminalize. This Court has previously granted certiorari "to resolve an existing conflict among the circuits [in regard to] the prohibition against making false statements in connection with the acquisition of a firearm." *Huddleston*, 415 U.S. at 818-19.

II. THE ACTUAL BUYER POLICY WAS PROMULGATED WITHOUT NOTICE AND COMMENT IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT.

The actual buyer policy is a legislative rule. The APA requires that legislative rules be promulgated via notice and comment procedures. Because the actual buyer policy was not promulgated in accordance with those requirements, it is procedurally invalid.

A. The APA requires notice and comment.

The APA establishes procedures that agencies must use in enacting rules, 5 U.S.C. §553 (LEXIS through P.L. 113-18), which are defined as, "the whole or a part of an agency statement of general or particular applicability and future effect designed to

implement, interpret, or prescribe law or policy. . . ." *Id.* §551(4).

B. The actual buyer policy does not qualify for any exception to the notice and comment requirements.

Agencies may avoid notice and comment procedures for rules relating to specific subjects, none of which apply here, *id.* §553(a), or when the agency finds with good cause that, "notice and public procedure . . . are impracticable, unnecessary, or contrary to the public interest." *Id.* §553(b)(B). An agency claiming the latter exception must publish its finding and a statement of its reasons in the rule. *Id.* BATFE has not done that here.

C. The actual buyer policy is not an interpretive rule, general statement of policy, or rule of organization or procedure.

Section 553 of the APA also excludes from the notice and comment requirement, "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," 5 U.S.C. §553(a)(A). These are "non-legislative rules." Rules that fall into none of the exceptions are subject to notice and comment rule making and are commonly referred to as legislative rules. Legislative rules promulgated without notice and comment are procedurally invalid.

As an initial matter, rules of "organization, procedure, or practice" are internal rules that do not

"substantially effect the rights of those over whom the agency exercises authority." *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974). Clearly, the actual buyer policy – which regulates federal firearm licensees ("FFL") and transferees – is not this type of rule.

The *Attorney General's Manual on the Administrative Procedure Act* defines several key terms as follows:

> Substantive rules – rules, other than organizational or procedural under section 3(a)(1) and (2), issued by an agency pursuant to statutory authority and which implement the statute. . . . Such rules have the force and effect of law.
>
> Interpretative rules – rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. . . .
>
> General statements of policy – statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.

American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993), quoting *Attorney General's Manual on the Administrative Procedure Act* at 30 n.3 (1947). "The *Attorney General's Manual* is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA." *Pacific Gas & Electric Co. v. Federal Power Commission*, 506

F.2d 33, 38 n.17 (D.C. Cir. 1974). These definitions have been bolstered by judicial gloss.

Interpretative rules "merely restate or explain the preexisting legislative acts and intentions of Congress." Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1312, 1324 (1992) (citations omitted). In *American Mining Congress*, the D.C. Circuit considered Program Policy Letters ("PPLs") issued without notice and comment by the Mine Safety and Health Administration ("MSHA"). MSHA had previously enacted regulations requiring affected parties to report "diagnoses" of certain occupational illnesses. The disputed PPLs established standards for determining when chest x-rays constituted "diagnoses." 995 F.2d at 1107-1108. The *American Mining Congress* court laid out the following test for determining whether a rule is legislative and is therefore subject to notice and comment requirements:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or

> (4) whether the rule effectively amends a prior legislative rule.

Id. at 1112. An affirmative answer to any of these questions indicates a legislative rule. This approach has been favorably cited or outright followed, in whole or in part, by numerous federal appellate courts. *See, e.g., Sweet v. Sheahan*, 235 F.3d 80, 91 (2d Cir. 2000); *Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary*, 93 F.3d 103, 113 (3d Cir. 1996); *West Virginia v. Thompson*, 475 F.3d 204, 211 n.2 (4th Cir. 2007); *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996); *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1088 (9th Cir. 2003); *Mission Group Kan. v. Riley*, 146 F.3d 775, 784 (10th Cir. 1998).

American Mining Congress concluded that the PPLs were merely interpretive rules. The MSHA had neither published them in the Code of Federal Regulations ("CFR"), nor invoked its legislative authority in issuing them. The PPLs merely required reporting of certain x-ray results that were "surely equivalent, in normal terminology, to a diagnosis"; thus the PPLs neither repudiated nor were irreconcilable with the prior regulation. 995 F.2d at 1113. The Court concluded that, even absent the PPLs, there would have been sufficient legislative basis for agency action by virtue of the prior regulation.

American Mining Congress distinguished earlier cases that inquired whether a disputed rule had "binding effect," explaining that this analysis was

useful for determining whether a rule was an exempt general policy statement, but not whether it was an interpretive rule. *Id.* at 1111.

An important case in this vein was *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974), which involved a Policy Statement, issued by the Federal Power Commission without notice and comment, establishing priorities for pipeline owners in delivering natural gas during shortages. The Policy declared the Commission's intent to adhere to the priority schedule except in cases of individualized showings by pipeline companies that a different plan would be "more in the public interest." *Id.* at 36. Holding that the Policy Statement was a general statement of policy, the Court reasoned that a substantive rule "establishes a standard of conduct which has the force of law" and generally cannot be challenged in subsequent administrative proceedings. *Id.* at 38. In contrast, a general policy statement merely "announces the agency's tentative intentions for the future. [And w]hen the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." *Id.* Since the Policy Statement disclaimed any intent to establish a binding rule, expressed an intent to permit parties to challenge the underlying policy, and "expressly envision[ed] further proceedings," the court held that it was a statement of general policy and not a substantive rule. *Id.* at 40.

The Court applied a similar, but retrospective, test in *United States Telephone Association v. Federal*

Communications Commission, 28 F.3d 1232 (D.C. Cir. 1994), in which the D.C. Circuit set aside a schedule of penalties for Communications Act violations. The FCC argued that the schedule was a statement of policy. The court reasoned that, "the distinction between [substantive rules and statements of general policy] . . . turns on an agency's intention to bind itself to a particular legal policy position." *Id.* at 1234. Relying heavily on the fact that the schedule had been applied "in over 300 cases and only in 8 does the Commission even claim that it departed from the schedule," the court concluded that the FCC intended to be bound by the penalty schedule. *Id.*

Applying these tests to BATFE's actual buyer policy compels the conclusion that that policy is a legislative rule.

1. The actual buyer policy is not an interpretive rule.

By the plain language of the *Attorney General's Manual*, the actual buyer policy cannot be an interpretive rule. Neither question 11.a of Form 4473, the associated notices or instructions, nor the statements published in the *Reference Guide* purport to "restate" the language of any statute or rule. None of these reference a specific statute or regulation. The terms "straw-purchase" and "actual buyer" or variants thereof do not appear in the GCA or in the CFR.

2. The actual buyer policy is not a general statement of policy; it establishes a categorical rule.

Nor is the actual buyer policy a general statement of policy. Looking to the *Attorney General's Manual*, it is noteworthy that no statute grants BATFE any generalized "discretionary power" to prohibit previously lawful firearm transfers. *Pacific Gas & Electric* compels the same conclusion. No published expression of the actual buyer policy, whether in the *Reference Guide* or on Form 4473, evinces an intent by BATFE to permit case-by-case challenges to the policy in subsequent administrative proceedings. *Pac. Gas & Elec.*, 506 F.2d at 40. The policy is no mere "statement of tentative intentions for the future." *Id.* at 38. Nothing in the policy suggests that an FFL who knowingly transfers a firearm to a person not the actual buyer could defend his license in a revocation proceeding by demonstrating that the ultimate recipient was not a prohibited person, and that the transferee and the ultimate recipient observed all requirements for lawful transfer of possession. Nothing in the policy appears to "envision further proceedings" at which its underlying basis may be challenged. *Id.* at 40. The actual buyer policy simply announces categorical rules, and categorical prohibitions based upon those rules. As the instant case demonstrates, FFLs and transferees completing Form 4473 must adhere to those rules without exception.

3. The actual buyer policy is a legislative rule, without which there would be no adequate legislative basis for enforcement.

Under *American Mining Congress*, the actual buyer policy is a legislative rule because "in its absence there would not be an adequate legislative basis," 995 F.2d 1112, for BATFE to prohibit an FFL from transferring a firearm to a middleman for ultimate delivery to a non-prohibited person, or for redefining straw-purchases to include transfers to persons entitled to receive and possess firearms. Nothing in the GCA or CFR inherently criminalizes those activities. Indeed, as discussed *supra*, at 10-11, for many years BATFE publicly conceded that the GCA does not prohibit that conduct. The GCA has not changed in any relevant respect in the intervening years. Nor has BATFE published any regulation in the CFR that plausibly can be read to prohibit the conduct reached by the actual buyer policy.

BATFE obviously knew when it implemented the actual buyer policy that it lacked "adequate legislative basis" for enforcement. Had BATFE believed it had such a basis, it could simply have repudiated Industry Circular 79-10 and begun enforcing the new rules. It did not. Only by adding the actual buyer certification and the accompanying instructions to Form 4473 was BATFE able to bootstrap previously lawful answers on the form into false statements. Those additions were part of the actual buyer policy itself. Without them there was no "adequate legislative basis" for enforcing the policy.

The actual buyer policy is procedurally invalid. It should have been promulgated by notice and comment rule making.

CONCLUSION

BATFE's Question 11.a Form 4473 exceeds statutory authority because it criminalizes the legal transfer of firearms between non-prohibited persons. There is no statutory authority for this prohibition and it violates the plain intent of Congress. Even if this Court concludes that the actual buyer policy is within BATFE's discretion, the policy is procedurally invalid because it was not issued through notice and comment rule making.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-1493

IN THE

Supreme Court of the United States

BRUCE JAMES ABRAMSKI, Jr., *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Brief *Amicus Curiae* of Congressman Steve Stockman, Former ATF Assistant Director Robert E. Sanders, Gun Owners Foundation, U.S. Justice Foundation, Gun Owners of America, Inc., Institute on the Constitution, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Conservative Legal Defense and Education Fund, DownsizeDC.org, Downsize DC Foundation, Policy Analysis Center, Oregon Firearms Federation, Virginia Citizens Defense League, and Wisconsin Gun Owners in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Congressman Steve Stockman represents the 36th Congressional District of Texas in the U.S. House of Representatives. Robert E. Sanders is the former Assistant Director of Criminal Investigation for the Bureau of Alcohol, Tobacco, and Firearms.

Gun Owners Foundation, U.S. Justice Foundation, Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, Downsize DC Foundation, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and are public charities. Gun Owners of America, Inc., Abraham Lincoln Foundation, and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

The organizational *amici* were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the Second Amendment and individual right to acquire, own, and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this Court and other federal courts.

Oregon Firearms Federation, Virginia Citizens Defense League, and Wisconsin Gun Owners are state firearms advocacy groups.

STATEMENT OF FACTS

The case against Petitioner Bruce Abramski is yet further proof of the maxim that no good deed goes unpunished. In an effort to help his elderly uncle in Pennsylvania, who asked for assistance in the purchase of a gun for self-defense in the home, Abramski, a former police officer, offered to select a suitable firearm and acquire it from a federal firearms licensee ("FFL") in Collinsville, Virginia that offered discounts to police officers. United States v. Abramski, 706 F.3d 307, 311 (4th Cir. 2013) ("Abramski II").

Abramski consulted with three different FFLs on how such a purchase could be accomplished legally. The FFLs "apparently advised Abramski, in essence, that a licensed dealer in Pennsylvania could complete the transfer to his uncle after the handgun had been purchased by Abramski in Virginia." *Id.* Following this advice, Abramski went to the Virginia dealer, completed a Bureau of Alcohol, Tobacco, Firearms and

Explosives ("ATF") Form 4473, and purchased a Glock 19 for his uncle. *Id.* Abramski traveled to Pennsylvania and transferred the firearm to his uncle at a Pennsylvania FFL, completing the necessary paperwork. Abramski's uncle gave him a check in the amount of $400 in payment for the gun. Confirming the transfer, the uncle gave Abramski a receipt reflecting that the uncle had purchased the Glock 19 handgun for $400. *Id.*

As the court of appeals below recounted, "[m]eanwhile" Abramski became a suspect of a bank robbery which led to Abramski's arrest and to an FBI investigative search that led to the discovery of the "written receipt confirming the transfer of the Glock 19 handgun from Abramski to" his uncle. *Id.* Federal authorities never charged Abramski with bank robbery, and state bank robbery charges were dismissed. However, federal prosecutors obtained a two-count indictment charging Abramski with having made a false statement in violation of 18 U.S.C. §§ 922(a)(6), 924(a)(2), and 924(a)(1)(A) on the ground that Abramski had represented falsely to the Collinsville, Virginia FFL that he was the "actual buyer" of the Glock 19, when the real buyer was his uncle.[2] *Id.* at 311-12.

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[2] The prosecution's strategy to go after Abramski for making a "straw purchase" appears to be akin to that employed in United States v. Costello, 666 F.3d 1040 (7th Cir. 2012), wherein Circuit Judge Richard Posner observed that "[n]o doubt" the prosecution of a defendant for harboring an illegal alien "was brought because the Justice Department suspects that the defendant was involved in her boyfriend's drug dealings, but cannot prove it, so the Department reaches into its deep arsenal (the 4000-plus federal

Before trial, Abramski moved to dismiss both counts, arguing that he had not made a "material misrepresentation" when he claimed he was the "actual transferee/buyer" of the Glock 19. *See id.* at 311-12. The district court denied the motion, rejecting that contention and also rejecting Abramski's argument that the "actual buyer" question was unauthorized by law. *See* United States v. Abramski, 778 F. Supp. 2d 678, 680-81 (W.D. Va.).

The court of appeals affirmed, concluding that the ATF Form 4473 warned Abramski "in bold type" that he was not the "actual buyer" of the Glock 19 "if he was buying it for someone else," and that the "undisputed facts show that Abramski's transfer of the Glock 19 [to his uncle] was not an afterthought[,] but a carefully calculated event — indeed, it was the sole reason for Abramski's purchase of the Glock 19 handgun." Abramski II, 706 F.3d at 316.

It is undisputed that both Abramski and his uncle were eligible to purchase and possess firearms. It is undisputed that both Abramski and his uncle had their backgrounds checked, and both were cleared by the FBI to acquire the firearm. It is undisputed that there is no law or regulation prohibiting the purchase of a firearm from an FFL by one person for a third party, if both are eligible to receive a firearm. And yet, inexplicably, Abramski now stands before this Court a felon, convicted of having made a false statement in violation of federal law.

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crimes) and finds a crime that she doubtless never heard of that it can pin on her." *Id.* at 1048.

SUMMARY OF ARGUMENT

Bruce James Abramski's conviction cannot stand for three reasons. First, the question he was asked by the ATF Form 4473 — whether he was the "actual buyer" of the firearm — is invalid, not only unauthorized by law and regulation, but in actual conflict with both. Second, Mr. Abramski's statement was not, in fact, false, since the question posed by the ATF Form 4473 is ambiguous, and the accompanying instructions are confusing. Third, the question as posed by the ATF Form 4473 arbitrarily and discriminately imposed a duty upon Mr. Abramski inconsistent with the policy it purports to enforce.

The Court should grant review on the merits of these arguments because the straw purchase theory upon which Mr. Abramski's conviction rests is the product of an illegitimate exercise of administrative power, which has been approved by a divided federal judiciary, and which has not been, but should be, rejected by this Court. At stake in this petition is not just a single conviction of one man, but the principle of judicial fidelity to the canon of construction that the text of a statute determines the intent of Congress, not the language of a bureaucratic form, nor even the opinions of judges.

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES COMPELLING CONCERNS ABOUT THE ADMINISTRATION OF THE NATIONAL INSTANT BACKGROUND CHECK SYSTEM THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

As Petitioner Bruce Abramski has ably demonstrated, this Court should grant review on the merits of the questions presented because the decision of the court of appeals below is in direct conflict with the decision of two other courts of appeals on the question whether a person may be prosecuted and convicted of making a false statement that he is the "actual buyer" of a firearm, when that statement is not material to the lawfulness of the sale. Additionally, as demonstrated below, this Court should grant review because the decision of the court of appeals below was based upon an illegitimate ATF "straw purchase doctrine," wholly unauthorized by, and in conflict with, federal law. This is a compelling question that has not been, but should be, settled by this Court now, rather than allowing it to fester unresolved in the lower federal courts.

A. The ATF "Straw Purchase" Doctrine Upon Which Abramski's Conviction Rests Conflicts with Both Statute and Regulation.

At the heart of the Government's case against Abramski is a "straw purchase" theory that it is

impermissible for a person to purchase a firearm from an FFL if the transferee is acting as an agent for a third party who furnishes the funds for the purchase, even if both parties are eligible to possess a firearm. This theory is reflected in Question 11.a. of the ATF Form 4473, the prescribed form required of all persons seeking to purchase a firearm from an FFL. 27 C.F.R. § 478.124.

Section A of the Form states that it "Must Be Completed Personally By Transferee (Buyer)." Question 11.a. of the Form asks: "Are you the actual transferee/buyer of the firearm listed on this form?" After posing this question, the form states in bold:

> **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.**

Immediately following this warning is the directive, in italics, *"See Instructions for Question 11.a."* This instruction is found on page 4 of the 6-page Form 4473 under the bold heading: "**Actual Transferee/Buyer**." Underneath this heading is the following narrative:

> For purposes of this form, you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself.... You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party.

Although "the [ATF] Director is authorized [by ATF regulation] to prescribe all forms," that authorization is strictly limited to developing forms to gather "[a]ll of the information called for" by law or regulation. 27 C.F.R. § 478.21. Accordingly, the ATF Form 4473 was supposedly designed to facilitate FFL compliance with National Instant Criminal Background Check System ("NICS"), as provided in 27 C.F.R. § 478.124, but the Director has no authority to make policy in this area. There is no statute or regulation authorizing the Director — by form, industry guideline, or other action — to prohibit the purchase of a firearm from an FFL for a third party, or, indeed, to exempt gift purchases from that prohibition, as stated in the instructions to Question 11.a.

To the contrary, 18 U.S.C. § 922(t)(1) provides that an FFL "shall not **transfer** a firearm to any other person who is not [an FFL], unless — before the completion of the **transfer** ... the system has not notified the licensee that the receipt of a firearm by such other person [the named transferee] would violate subsection (g) or (n) of this section; and the **transferor** has verified the identity of the **transferee** by examining a valid identification document (as defined in 1028(d) of this title)[3] of the **transferee**

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[3] According to 18 U.S.C. Section 1028(d), the term "'identification document' means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State ... which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of **identification** of

containing a photograph of the **transferee**." (Emphasis added.) There is nothing in the United States Code that requires an FFL to go beyond identifying the transferee to be the person who the transferee claims to be.[4]

In compliance with this statute, and consistent with the identity policy stated therein, 28 C.F.R. § 25.7(a) provides that, in order to obtain clearance to transfer a firearm, the FFL need only to transmit to NICS the: (i) name; (ii) sex; (iii) race; (iv) complete date of birth; and (v) state of residence of the proposed transferee.[5] To require an FFL to do more than verify the physical and personal identity of the transferee would undermine a key purpose of the NICS system —

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individuals." (Emphasis added.)

[4] "NICS is a computerized background check system designed to respond within 30 seconds on most background check inquiries so that the FFLs receive an almost immediate response." *See* FBI, "National Instant Criminal Background Check System, Fact Sheet (NICS Fact Sheet), p. 1, http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet.

[5] To be sure, "additional identifiers may also be" included by the FFL, either voluntarily or upon request, including "height, weight, eye and hair color, and place of birth" (28 C.F.R. § 25.7(b)), but none of these identifiers would impede a quick response. Even the ATF Form 4473 regulations contemplate a Form that should facilitate a rapid reply. According to 27 C.F.R. § 478.124(c)(2), Form 4473's request for "optional information," such as a Social Security Number, is sought "in order to **facilitate** the transfer of a firearm and **enable** NICS to verify the **identity** of the person acquiring the firearm number ... to help avoid the possibility of the **transferee** being **misidentified** as a felon or other prohibited person." (Emphasis added.)

to serve as "a national **instant** background check system that any [FFL] may contact ... for information, to be supplied **immediately**, on whether receipt of a firearm by a prospective **transferee** would violate section 922 of Title 18, United States Code, or State law." Public Law 103-159, 107 Stat. 1541 (Nov. 30, 1993).

This accelerated process to provide an instant response legislation was not accidental, but critical to the forging of NICS. In the years leading up to the passage of the Brady Bill, the major stumbling block for those Senators and Representatives favoring a criminal background check was the delay that would ensue between purchase and possession. *See* R. Aborn, "The Battle Over the Brady Bill and the Future of Gun Control Advocacy," 22 FORDHAM URBAN LAW J. 417 (1995). "As originally structured, the Bill required a seven-day waiting period." Finally, the necessary technology to conduct the instant background check instantaneously was developed. *See id.* Any further investigation into whether a purchase constitutes a "straw purchase," as the 4473 Form would require, is inconsistent with this key NICS feature to immediately determine the eligibility of the transferee.

In contrast with the Form 4473 requirement that the "transferee" be the "actual buyer," the statutes, the NICS regulations, and even the ATF regulations governing the Form 4473 refer to the person to whom a firearm is to be transferred as the "transferee," not the "buyer," not the "actual buyer," and not even the "actual transferee." Indeed, 27 C.F.R. § 478.124, the ATF regulation governing the Form 4473, refers to

"transferee" no less than 15 times, but never once with the modifier "actual," nor the word "buyer." Thus, the ATF regulations reinforce the NICS regulations requiring an FFL only to physically identify the "transferee," the person standing before him, not some third party outside the FFL's presence. Nowhere in any statute or regulation is there any duty imposed on the FFL — or authority given to ATF — to inquire as to whether the transferee is the "actual buyer" — whatever that term may mean.

While the word "transferee" is ubiquitous, it is found neither among the definitions set forth in 18 U.S.C. § 921(a) nor in the NICS regulations. *See* 28 C.F.R. § 25.2. Nor is transferee defined in the ATF regulations addressing the meaning of terms. *See* 27 C.F.R. § 478.11. Since it is not defined, the term "transferee" must be understood according to its "ordinary, contemporary, common meaning." *See* Perrin v. United States, 444 U.S. 37, 42 (1979). In the context of the applicable statutes and regulations, "transferee" is consistently used as an identifier of the person to whom property is physically transferred, not some other person. Indeed, as provided in 18 U.S.C. § 922(t)(1)(C), the FFL transferor is instructed to verify the physical and personal identity of the person inside the gun store seeking the transfer of a firearm — not some other person who the ATF might deem the "actual buyer." Rather, the statutory guidelines contemplate that, upon verification of a person's physical identity and clearance from NICS, the FFL transferor is authorized to transfer that firearm, and the transferee is authorized to receive it.

Likewise, the FFL signature paragraph on page three of the ATF Form 4473 contemplates that the FFL's only duty is to identify the physical transferee. Otherwise how could the FFL sign his name affirming that "it is [his] belief that it is not unlawful for [him] to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the **person identified in Section A**"? Form 4473 (emphasis added). Only if the FFL's duty is limited to verifying the physical identity of the transferee could the FFL have sufficient assurance that the transfer of a firearm is "not unlawful." If, however, the "person identified in Section A" must be the "actual transferee/buyer," as required by Question 11.a., then the FFL would be put into the unenviable position of basing his statement solely upon the representation of the transferee, or of having to make inquiry whether that transferee is, in fact, the "actual buyer." Unlike the statutory duty to determine the physical identity of the individual person to whom a firearm is to be delivered, as set forth in 18 U.S.C. § 922(t)(1)(C), there are no statutory or regulatory guidelines explaining how an FFL is to determine whether the person identified under the law is the "actual buyer." Yet, the ATF Form 4473 requires the FFL to sign a statement that he believes that it is not unlawful to deliver a firearm to the person who answers "yes" to the question whether he is the "actual transferee/buyer."

In order for the ATF Form 4473 to identify, and thus truly curtail, straw purchases, the FFL transferor could not just rely on the transferee's word that he is buying the firearm for himself, much less upon the transferee's word that he is buying it as a gift. Yet, in

a section entitled "**NOTICES, INSTRUCTIONS AND DEFINITIONS**," ATF Form 4473 states that "the seller of a firearm **must determine the lawfulness** of the transaction and maintain proper records of the transaction." (Emphasis added.)

Unlike all other questions asked of the transferee on the form (for example, whether he is a felon), the FFL cannot rely on the NICS check for his "belief" that the transferee is the "actual buyer." After all, prior to making the firearm transfer, NICS only would have "inform[ed] the licensee that it has **no information** that receipt of the firearm by the **transferee** would be in violation of Federal ... law." 27 C.F.R. § 478.102(a)(2) (emphasis added). Without the NICS system running the name of the person whom the ATF deems to be the "actual transferee/buyer," the NICS clearance is of absolutely no value to the FFL.

B. The ATF Form 4473's Question 11.a. and Instructions Are Misleading and Confusing, Creating a Trap for the Unwary.

The ATF Form 4473 states that "the information and certification on this form are designed" not just for the licensee, but "to alert the **buyer** of certain restrictions on the receipt and possession of firearms." (Emphasis added.) Section A of the Form, which is to be "completed personally" by the buyer, refers to that buyer in four different ways. First, it identifies the person who is completing the form as the "Transferee (Buyer)." Second, the form requires in box 1 the "Transferee's Full Name." Third, Question 11.a asks

the one filling out the form whether he is "the actual transferee/buyer," followed immediately thereafter by a warning that, unless the person is the "actual buyer, the dealer cannot transfer the firearm." Fourth, in the instructions referring to Question 11.a., which are found on page 4, the Form appears to settle on "actual transferee/buyer," restating that phraseology six times, without repeating any of the other terms.

As discussed above, nowhere does the statutory or regulatory text use either the term "buyer," or the word "actual" as a modifier of either "buyer" or "transferee." Both of those words have been added by ATF. Moreover, as noted above, the Form 4473 contains no definition of any of these terms. They are used interchangeably, as if synonymous — but they are not.

There are four possible ways of interpreting the term, "transferee/buyer." Two can be immediately discounted; one is ATF's interpretation, which is flawed; and the last appears to be the correct one.

The **first** possibility is that the forward slash is most commonly used as a word substitute for "or" to indicate a choice such as Male/Female (often mutually exclusive) between the two words. However, a mutually exclusive definition, whereby none of one classification can belong to the other, would mean that in no case can a transferee be a buyer, which is absurd on its face.

The **second** possibility is a Venn diagram, in which buyers and transferees are distinct

classifications, with some overlap. Some buyers may be transferees, and some transferees may be buyers. This too, is absurd, because the Form 4473 could not ask a question of a buyer who was not also the transferee — since the transferee is always the person present and completing the form.

The **third** possibility, which is ATF's position, is that buyers and transferees are in all cases synonyms — and where this is not the case, the law has been violated. This understanding is policy-driven, describing what the ATF desires the law to be, but is inconsistent with the ATF's own regulations and with other usages separating "transferee" and "buyer" on the Form 4473.

The **fourth** possibility is a type of Euler diagram, with a small circle completely inside a larger one, wherein all buyers must be transferees, but not all transferees must be buyers. This is the possibility that makes the most sense when considering the text and purpose of the statute.

While such imprecise usage of terminology might be permissible in ordinary discourse, the Form 4473 is a legal document, and serves as a basis for felony prosecutions for making a false statement. Indeed, at the end of Section A of the Form 4473 is a statement requiring the "transferee's/buyer's" signature that his "answers to Section A are true, correct, and complete" and that it is his "understanding that making any false oral or written statement ... with respect to this transaction, is a crime punishable as a felony under Federal law...."

In Question 11.a, the person filling out the form is warned that if he is not the "actual buyer," then the FFL is not permitted to transfer the firearm to him. But since that question is posed to "the actual transferee/buyer," not just the "actual buyer," a person who is purchasing the firearm with another person's money might reasonably infer that he is the "actual transferee," not the "actual buyer." Thus, he could reasonably determine that the warning to the "actual buyer" is inapplicable to him. Of course, the instructions on page 4 could dispel any such inference, but only if the forward slash is perceived as connoting that there is no real difference between an actual transferee and an actual buyer. Instead of introducing clarity, the instructions continue the ambiguity.

Although the instructions to Question 11.a. are designed to clarify who is an "actual transferee/buyer," they may very well be a cause for confusion. Consider Petitioner Abramski, for example. The instructions state that an actual buyer/purchaser includes a person who buys a firearm as a gift for another. Although Abramski did not pay for the firearm for his uncle, he did make a gift to his uncle in the form of using a discount to which only Abramski was entitled, and a service in selecting, buying, and transporting the Glock 19 as a favor to an elderly relative. Almost certainly, Abramski was moved by a compassionate desire to help a family member, rather than by a commercial interest to make a profit or assist an ineligible person.

Finally, the instructions on the Form 4473 prohibit buying a firearm with another person's money given to

the transferee **before** the sale, but permit buying one with one's own money. Here, Abramski clearly purchased the firearm with his own money, since he was reimbursed three days **after** he purchased the gun. The instructions make it appear that this distinction might matter.

In short, the instructions provided to the person completing the Form 4473 would invite various behaviors which ATF can selectively investigate and recommend for prosecution.[6]

C. The Form 4473 Distinction Between a Third Party Gift and a Third Party Purchase is Arbitrary and Capricious.

The purported rationale for the straw purchase doctrine is to keep guns out of the hands of persons who could not pass the NICS check, by preventing such persons from using another person to obtain the

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[6] Allowing the exercise of such discretionary power also puts at risk the Second Amendment right to keep and bear arms, including the right to keep and bear arms for self-defense secured in D.C. v. Heller, 554 U.S. 570 (2008). The right "to keep" is the right "'[t]o retain; not to lose,' and to have in custody." *Id.* at 582. Implicit in a right to hold, to retain in one's power or possession, is the right to acquire a firearm by purchase or gift. Otherwise, the right to keep and bear arms would belong only to those persons who could manufacture a firearm by and for themselves. Under the straw purchase theory, many persons constitutionally entitled to keep and bear a firearm for self-defense would be denied that right, ostensibly to prevent other persons not entitled to that right from obtaining a firearm by third-party purchase. The conflict among the circuits is ripe, and the exercise of Second Amendment rights hangs in the balance.

firearm. *See* United States v. Nelson, 221 F.3d 1206, 1209-10 (11th Cir. 2000). An exception is made by ATF, however, for gifts. Thus, despite the purported rationale, question 11.a. of Form 4473 is both underinclusive and overinclusive. On one hand, in the case of a gift, the form does not inquire disclosure of the "actual transferee," the donee. On the other hand, in case of a third party purchase, the form demands the disclosure of the "actual transferee," the buyer. Yet, in some cases the donee would be ineligible to obtain a firearm in his own name, and the buyer would be eligible to obtain a firearm in his own name, such as was the case involving Abramski and his uncle. Had Abramski made the Glock 19 a gift, he would not be a convicted felon, even though the actual transferee in both cases was his elderly uncle. The distinction between a purchase and a gift, then, is wholly arbitrary in light of the rationale underlying the straw purchase theory.

Further evidence of the ATF's arbitrary and capricious use of the straw purchase doctrine is the agency's infamous Operation Fast and Furious. In that operation, the ATF intentionally facilitated straw purchases for over 2,000 firearms. Unlike Abramski's purchase which went to a law abiding citizen, the firearms acquired through ATF's straw purchases went to Mexican cartel members, who obviously were ineligible to possess firearms and, in fact, used ATF's guns to commit countless murders.[7] To this day, none

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[7] *See* R. Serrano, "Police chief killed with rifle lost in ATF gun-tracking program," *L.A. Times*, July 5, 2013, www.latimes.com/news/nation/nationnow/la-na-nn-atf-fast-

of the federal agents, including ATF personnel, who facilitated those unlawful (and ultimately tragic) straw purchases have been charged with any crime.[8] Yet, Abramski has been prosecuted for helping his elderly, law abiding uncle obtain a firearm for self-defense.

Because question 11.a. does not reflect a coherent policy of keeping firearms out of the hands of ineligible persons, and is arbitrary and capricious, it cannot form a legitimate legal basis for the charge against Abramski.

D. Congress Has Not Enacted Any Law Authorizing the Prevention of Straw Purchases of Firearms From Licensed Firearm Dealers.

As demonstrated by the Petition, ATF policy as expressed in its Form 4473 has become the operative law governing straw purchases in those Circuits that have followed the lead of the Sixth and Eleventh Circuits. The Court of Appeals for the Eleventh Circuit expressed this policy decision as follows: "If an ineligible buyer could simply use a 'straw man' or agent to obtain a firearm from a licensed dealer, the statutory scheme (prohibiting sales to ineligible

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furious-20130705,0,2692834.story.

[8] *See generally* D. Wagner, "Family of slain border agent Brian Terry calls for prosecution of feds," *The Arizona Republic*, Dec. 15, 2011, http://www.azcentral.com/arizonarepublic/local/articles/2011/12/15/20111215family-slain-border-agent-calls-prosecution-feds.html.

buyers) would be too easily defeated." Nelson, 221 F.3d at 1209. As a justification for creating new law, the court claimed that: "Surely, Congress could not have intended to allow such easy evasion of a comprehensive scheme." *Id.* at 1210.

But the intent of Congress is not found in the bosom of a court. Rather, it is found by a careful analysis of the language in the applicable statutes and regulations. *See* Lamie v. United States Trust, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text ... and not the predecessor statutes.") Instead of examining the relevant statutory and regulatory texts, the court of appeals below based its decision on the text of the ATF Form that, unless the transferee is the "actual buyer" of the firearm, the sale is illegal. *See* Abramski II, 706 F.3d at 316.

Under the canon of statutory construction set forth in Lamie, the court's starting point should have been the congressional language in the Brady Bill, codified in 18 U.S.C. § 922(t), subsection (1)(C) of which spells out the duty of the transferor to verify the identity of a single transferee by "examining a valid identification document," such as a state-issued driver's license with the transferee's picture on it. ATF's curious "straw purchase" doctrine impermissibly substitutes for this statutorily mandated identification process a duty to verify the identify of some other transferee who is not there, who the ATF Form 4473 dubs to be the "actual transferee/buyer." In sum, the straw purchase doctrine requires an FFL to verify the identity of **two (or more) transferees**, in violation of the canon of

construction against "read[ing] an absent word into the statute." Lamie, 540 U.S. at 538.

In its zeal, the ATF (aided by the court of appeals below) has filled in what is perceived to be a "gap in the Brady regulatory apparatus process." *See* J. Jacobs and K. Potter, "Keeping Guns out of the Wrong Hands: The Brady Law and Limits of Regulation," 86 J. OF CRIM. LAW AND CRIMINOLOGY 93, 107 (1995). This "gap," however, was not the product of congressional oversight, but a reflection of the legislative process of cobbling together a bill that could pass both houses of Congress in an intensely fought battle over gun control on Capitol Hill. *See* R. Aborn, "The Battle Over the Brady Bill," *supra*.

Firearms legislation in the United States is usually fraught with such controversy and, for that reason, filled with compromises. These compromises may look like inordinate gaps to judges, but they are oftentimes necessary to forge a winning coalition to obtain passage of a bill. Thus, courts must look at the text of the law that was actually enacted by Congress, rather than affirming the actions of unelected ATF bureaucrats who bypassed the regulatory process to add a new provision to the law by fiat. The intent of Congress cannot be replaced by judicial reasoning, and certainly not by the unfettered discretion of an executive agency.

E. Congress Has Thus Far Declined to Enact the ATF "Straw Purchase" Doctrine into Law.

After the Newtown, Connecticut mass shooting that killed 20 children in December 2012, there was a flurry of activity in the United States Senate to respond to the tragedy. *See* J. Steinhauer, "Senate Panel Approves two Gun Control Bills," *The New York Times* (March 12, 2013). Democratic Senators Leahy and Durbin introduced S. 54 – the "Stop Illegal Trafficking in Firearms Act of 2013." The featured provision of that bill was its section punishing and deterring the straw purchase of firearms. The operative provision stated as follows:

> Any person ... who knowingly purchases any firearm for, on behalf of, or with the intent to transfer it to any other person ... shall be fined under this title, and imprisoned not more than 20 years or both. [*Id.*, section 3 (adding new section 932(a) to Title 18, United States Code, Chapter 44).]

The only exception to this prohibition was any "firearm that is lawfully purchased by a person ... to be given as a bona fide gift to the recipient who provided no service or tangible thing of value to acquire the firearm." *Id.*, section 932(b)(1).

Hailed by gun control advocates as a step in the right direction, the bill almost died in committee, until it was amended to prohibit only purchases where the purchaser knows or has reason to believe that the

person for whom the firearm was being purchased was not eligible to receive the firearm under federal or state law. *See* E. Donga, "Leahy's 'Straw Purchase' Firearms Bill Clears Committee," *Times Argus* (March 8, 2013). *The New York Times* incorrectly reported that Leahy's initial straw purchase bill was already a crime, and that the original bill only ratcheted up the penalty. *See* J. Steinhauer's "Senate Panel Approves Two Gun Control Bills," *supra*. *See also* 18 U.S.C. § 922(d). But the first proposal was already a crime only because the ATF said so and the court permitted it. In reality, had the original Leahy/Durbin bill made it out of committee, it would have changed the law, by conforming the U.S. Code with ATF's currently illegitimate "straw purchase" doctrine.[9]

As the United States District Court for the Northern District of Alabama observed in United States v. Dollar, 25 F. Supp. 2d 1320 (N.D. Ala. 1998), the ATF changed the law without legislation or regulation, simply by changing the Form 4473. Previously, the Form 4473 had contained a prohibition on transfer when an eligible person was buying a firearm for an ineligible person. However, in 1995 the ATF changed this language to include a prohibition on transfer even when one eligible person was buying it for another eligible person. *See id.*, 25 F. Supp. 2d at

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[9] The only difference between the proposed bill and the current ATF straw purchase policy would have been an additional exception for a purchase of a firearm "to be given to a bona fide winner of an organized raffle, contest, or auction...." S. 54, section 932(b)(2).

1324 n.6. Such a change in policy is plainly an illegitimate usurpation of legislative power.

CONCLUSION

It is true that it is possible to avoid the NICS check when a person purchases a firearm for a third person who is ineligible to own it. But Congress never gave the ATF the authority, in a NICS check, to question where a firearm might eventually wind up. Rather, the text of the statutes prohibit only the transfer of a firearm from an FFL to an ineligible person, and the receipt of a firearm by a person who knows he is ineligible. *See* 18 U.S.C. § 922(d)(1)-(9). It is neither for the courts nor for ATF to create crimes where Congress has not done so.

For the reasons stated herein and in the Petition, the Petition should be granted.

Respectfully submitted,

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July 25, 2013

JOINT APPENDIX

No. 12-1493

IN THE

Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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APPENDIX A — RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
NO. 7:10-CR-00068-GEC-1

UNITED STATES OF AMERICA

v.

BRUCE JAMES ABRAMSKI, JR.

Date Filed	#	Docket Text
11/18/2010	3	SEALED INDICTMENT as to Bruce James Abramski, Jr (1) count(s) 1, 2. (lab) (Entered: 11/19/2010)
03/10/2011	44	MOTION to Dismiss by Bruce James Abramski, Jr. (Cleaveland, William)
		* * *
03/14/2011	46	RESPONSE to Motion by USA as to Bruce James Abramski, Jr re 44 MOTION to Dismiss (Wolthuis, Donald)
		* * *
03/14/2011	50	ORDER dismissed as moot 37 Motion for Bill of Particulars as to Bruce James Abramski Jr. (1); dismissed as moot 38 Motion for Bill of Particulars as to Bruce James Abramski Jr. (1);

		dismissed as moot 38 Motion to Amend/ Correct as to Bruce James Abramski Jr. (1); granted in part,denied in part, and taken under advisement in part 40 Motion in Limine as to Bruce James Abramski Jr. (1); denied 42 Motion to Suppress as to Bruce James Abramski Jr. (1); denied 43 Motion to Suppress as to Bruce James Abramski Jr. (1); denied 44 Motion to Dismiss as to Bruce James Abramski Jr. (1); granted in part, denied in part and taken under advisement in part 48 Motion in Limine as to Bruce James Abramski Jr. (1). Signed by District Judge Glen E. Conrad on 03/14/2011. (lab)

* * *

05/12/2011	83	Superseding Indictment as to Bruce James Abramski, Jr (1) count(s) 1s, 2s. (lab)

* * *

06/29/2011	96	PLEA AGREEMENT as to Bruce James Abramski, Jr. (lab)
06/29/2011	97	Minute Entry for proceedings held before District Judge Glen E. Conrad:Guilty Plea Hearing as to Bruce James Abramski, Jr held on 6/29/2011 Plea

entered by Bruce James Abramski Jr. (1) Guilty Count 1s,2s. (Court Reporter Webb) (lab)

* * *

10/03/2011 103 Minute Entry for proceedings held before District Judge Glen E. Conrad:Sentencing held on 10/3/2011 for Bruce James Abramski, Jr. (1), Count(s) 1, 2, Superseding Indictment Filed; Count(s) 1s, 5 years Probation incl. a 6 mo. period of home confinement, to run concurrently w/ term of probation in Count 2, Fine waived, Special Assessment $100 for each count, $200 total; Count(s) 2s, 5 years Probation incl. a 6 mo. period of home confinement, to run concurrently w/ term of probation in Count 1, Fine waived, Special Assessment $100 for each count, $200 total. (Court Reporter Judy Webb) (ssm)

* * *

10/04/2011 107 JUDGMENT as to Bruce James Abramski, Jr. (1), Count(s) 1, 2, Superseding Indictment Filed; Count(s) 1s, 5 years Probation incl. a 6 mo. period of home confinement, to run concurrently w/ term of probation in Count 2, Fine waived, Special Assessment $100 for

each count, $200 total; Count(s) 2s, 5 years Probation incl. a 6 mo. period of home confinement, to run concurrently w/ term of probation in Count 1, Fine waived, Special Assessment $100 for each count, $200 total. Signed by District Judge Glen E. Conrad on 10/03/2011. (ssm)

* * *

0/11/2011 110 NOTICE OF APPEAL to 4CCA by Bruce James Abramski, Jr re 107 Judgment by counsel. (ssm)

* * * *

Appendix A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
NO. 11-4992

UNITED STATES OF AMERICA,

APPELLEE

v.

BRUCE JAMES ABRAMSKI, JR.

APPELLANT

* * *

01/23/2013	75	PUBLISHED AUTHORED OPINION filed. Originating case number: 7:10-cr-00068-GEC-1 Paper copies to all parties and the district court/agency. [999027720]. [11-4992] (MR)
01/23/2013	76	JUDGMENT ORDER filed. Disposition method: 11-4992 opn.p.arg. Decision: Affirmed. Originating case number: 7:10-cr-00068-GEC-1. Entered on Docket Date: 01/23/2013. [999027734] Copies to all parties and the district court/agency.. [11-4992] (MR)

* * * *

APPENDIX B — EXCERPTS OF TRANSCRIPT OF MOTION HEARING OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION, DATED DECEMBER 14, 2010

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

No. 7:10-CR-68
Roanoke, Virginia
December 14, 2010

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BRUCE JAMES ABRAMSKI JR.,

Defendant.

EXCERPTS OF TRANSCRIPT OF MOTION HEARING BEFORE THE HONORABLE GLEN E. CONRAD UNITED STATES DISTRICT JUDGE.

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* * *

[87]Special Agent Keith Teehan.

KEITH TEEHAN, GOVERNMENT'S WITNESS, SWORN

THE CLERK: Have a seat right there, please.

DIRECT EXAMINATION

BY MS. NEESE:

Q. Please state your name.

A. Keith Teehan.

Q. And how are you employed?

A. Special Agent with ATF.

Q. And in your employment position, did you become involved in an investigation regarding Mr. Abramski and a straw purchase?

A. Yes, I did.

Appendix B

* * *

[96]Q. And if you had realized that before you went to Pennsylvania, if you all had typed in the serial number of that into your computer base, you would have picked up not only his name, but that Glock in his possession, without even making the trip; is that right?

A. No, sir.

Q. Where would those records be, then, and how do you-all know — with regard to Pennsylvania keeping those records, how does that — how does that happen, to document the transfer?

A. How does Pennsylvania document the transfer?

Q. Right. Pennsylvania documented the transfer of that pistol to Mr. Alvarez from Mr. Abramski; right?

A. Yes, sir.

Q. Are you saying that none of that information goes into any database for you folks to trace the owner of that weapon?

A. There's no maintained firearm registration, other than NFA weapons. So that —

Q. Okay. So the registration of the weapon when it was purchased in — at Town guns, that registration is maintained by the gun dealer, and that's all?

A. Only the initial purchaser of a firearm from a federally licensed firearm dealer would be maintained. So, in other words, if Mr. Abramski buys the gun from Town [97]Police Supply and that gun gets transferred to Mr. Alvarez in Pennsylvania, if that gun later would be traced through ATF, it would always come back to Mr. Abramski as the initial buyer. The transaction form that Pennsylvania has is just to maintain that Buyer A and Buyer B aren't prohibited people, that they can legally transfer that firearm.

Q. Okay. So we're in agreement that the transfer to Mr. Alvarez was legal?

A. Yes, sir.

Q. Right?

And we're in agreement that the purchase of the gun was legal?

A. No, sir.

Q. Well, what makes it illegal, the purchase or the transfer?

A. The transfer doesn't affect the purchase, sir. The purchase is what we're considering. The straw purchase of the firearm would be the offense.

Q. All right. Well, I guess — isn't it correct, though, that the only reason that we are here today is because the

contention is that the transfer to Mr. Alvarez was illegal because the document says he bought it for himself?

A. The purchase of the firearm for somebody else is the straw purchase. Mr. Abramski misrepresented himself on an [98]ATF form when he purchased the firearm.

Q. And I understand that part of it. But I just want to be sure I'm understanding that in this particular situation, aside from the check box, the transfer to his uncle was all legal?

A. Just to clarify, Mr. Abramski not being a prohibited person and Mr. Alvarez not being a prohibited person, that makes that transfer, if you will, lawful.

Q. Right.

A. The straw purchase of the firearm for Mr. Alvarez is unlawful. So it is the purchase that we're — it is kind of two separate instances. The purchase of the firearm is the point of consideration.

Q. But, as a matter of fact, if that gun had not been legally transferred to Mr. Alvarez, we wouldn't have a case today; isn't that right?

A. That is incorrect, sir.

Q. How — under what circumstances would you have a case today if you didn't know that the gun was transferred to Mr. Alvarez?

A. You mean like if he didn't go to an FFL or federally licensed dealer and transfer it? Is that your question?

Q. No, I'm saying if he purchased the gun just like he did, went down there, he paid cash money for it, filled out the forms and walked out the door, based on the paperwork [99]that was introduced in state court and which, I guess, is discovery for this case, based on that paperwork, if we took the transfer to Mr. Alvarez out of the picture, there's no prosecution?

A. So you are asking if you take elements of the offense out could we still prosecute—

THE COURT: He said you never would have discovered it, had they not transferred—

THE WITNESS: If we never found the gun, yes, sir, that would be correct.

BY MR. CLEAVELAND:

Q. I understand. And the only reason that happened is because everybody cooperated in giving you the information and saying, "This is exactly what we did." Nobody seemed to understand that there was anything illegal; right?

A. Mr. Alvarez was very forthcoming.

* * * *

APPENDIX C — MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED MARCH 10, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Case No. 7:10CR68-001

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRUCE J. ABRAMSKI, JR.,

Defendant.

MOTION TO DISMISS

COMES now, Bruce James Abramski, Jr., defendant, by counsel, and respectfully requests this Honorable Court to dismiss the two count indictment against him for the reasons set forth below:

1. The defendant, Bruce James Abramski, Jr. is charged in a two count indictment, that allege violations of title 18 United States Code Sections 922(a)(6), 924(a)(2) and 924(a)(1)(A).

2. These counts involve allegations that on November 17, 2009, the defendant provided false information to a federally licensed firearms dealer d/b/a Town Police Supply, as to a "material" fact that he was the actual buyer of a firearm (Glock model 19, 9mm semi-automatic pistol) when it is alleged that the defendant knew he was buying the gun for another individual.

3. Other than these alleged false statements, the Government has no proof of any other wrongdoing by the defendant related to his purchase or transfer of the Glock model 19, 9mm semi-automatic pistol. In fact, the Government's evidence is that this same Glock pistol was legally transferred to Angel Alvarez on November 21, 2009, at Spaz's Gun Shop in Pennsylvania. Angel Alvarez is the uncle of the defendant, and is legally eligible to purchase and own firearms.

4. There is no evidence of any attempt by the defendant or Mr. Alvarez, to subvert any of the laws of Virginia, Pennsylvania or the United States as a result of the purchase and subsequent transfer of this firearm.

5. No representation of the defendant, to Town Police Supply in regard to his purchase of the above described firearm, was a material representation. See *U.S. v. Polk*, 118 F.3d 286, 294 (1997).

Appendix C

THEREFORE, the defendant respectfully requests this Honorable Court to dismiss the two count indictment pending against him.

Respectfully submitted,

BRUCE J. ABRAMSKI, JR.

By: /s/ William H. Cleaveland
Of Counsel

William H. Cleaveland (VSB 18302)
Brandon O. Nester (VSB 78874)
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APPENDIX D — RESPONSE TO MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED MARCH 14, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Criminal No. 7:10CR00068

UNITED STATES OF AMERICA

v.

BRUCE JAMES ABRAMSKI, JR.

RESPONSE TO MOTION TO DISMISS

Comes now, the United States of America through its attorney and responds that the government will rely upon the following cases:

1. United States v. Phanphil, 57 M.J. 6 (U.S. Court of Appeals for Armed Forces, 2002).

2. United States v. Frazier, 605 F.3d1271 (11th Cir. 2010).

The government contends that these two cases contradict the reasoning set forth in United States v. Polk, 118 F.3d 286, 294 (5th Cir. 1997), and that the courts in two cases declined to follow Polk. However, even if this

court decided to follow the reasoning set forth in Polk, the government contends that the facts in the present case are distinguishable from the facts set forth in Polk.

Respectfully submitted,

TIMOTHY J. HEAPHY
United States Attorney

s/Donald R. Wolthuis
Assistant United States Attorney
VSB #19705
United States Attorney's Office
P.O. Box 1709
Roanoke, VA 24008
TEL (540) 857-2762
FAX (540) 857-2614

Dated: March 14, 2011

APPENDIX E — SUPERSEDING INDICTMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION, FILED MAY 12, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Criminal No. 7:10CR00068

UNITED STATES OF AMERICA

v.

BRUCE JAMES ABRAMSKI, JR.

SUPERSEDING INDICTMENT

Violations: 18 U.S.C. § 922(a)(6)
18 U.S.C. § 924(a)(1)(A)

COUNT ONE

The Grand Jury charges that:

1. On or about November 17, 2009, in the Western Judicial District of Virginia, the defendant, BRUCE JAMES ABRAMSKI, JR., in connection with his acquisition of a firearm, a Glock Model 19, 9 mm semi-automatic pistol, from a federally licensed firearms dealer, did knowingly make a false and fictitious written statement to said dealer, which statement was likely to

deceive said dealer, as to a fact material to the lawfulness of such sale of the said firearm to the defendant, BRUCE JAMES ABRAMSKI, JR., under chapter 44 of Title 18, in that the defendant, BRUCE JAMES ABRAMSKI, JR., represented that he was the actual buyer of the firearm, when in fact, as the defendant, BRUCE JAMES ABRAMSKI, JR., then well knew, he was buying the firearm for another individual.

2. In violation of Title 18, United States Code Sections 922(a)(6) and 924(a)(2).

COUNT TWO

The Grand Jury further charges that:

1. On or about November 17, 2009, in the Western Judicial District of Virginia, the defendant, BRUCE JAMES ABRAMSKI, JR., knowingly made a false statement and representation in connection with his acquisition of a firearm, to a federally licensed firearms dealer, with respect to information required by the provisions of Chapter 44 of Title 18, United States Code, to be kept in the records of Town Police Supply, in that the defendant, BRUCE JAMES ABRAMSKI, JR., represented that he was the actual buyer of the firearm, when in fact, as the defendant, BRUCE JAMES ABRAMSKI, JR., then well knew, he was buying the firearm for another individual.

2. All in violation of Title 18, United States Code, Section 924(a)(1)(A).

Appendix E

A TRUE BILL this 12 day of May, 2011.

/s/_____
FOREPERSON

/s/_____
TIMOTHY J. HEAPHY
UNITED STATES ATTORNEY

APPENDIX F — EXCERPTS OF THE ORAL HEARING BEFORE THE HONORABLE GLEN E. CONRAD, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, DATED JUNE 29, 2011

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CRIMINAL NO. 7:10-CR-00068
JUNE 29, 2011 11:53 A.M.
GUILTY PLEA
VOLUME I OF I

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BRUCE JAMES ABRAMSKI, JR.,

Defendant.

Before:

HONORABLE GLEN E. CONRAD
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF VIRGINIA

Appendix F

APPEARANCES:

For the Plaintiff:
DONALD R. WOLTHUIS, ESQUIRE
ASHLEY BROOKE NEESE, ESQUIRE
United States Attorney's Office
P.O. Box 1709
Roanoke, VA 24008

For the Defendant:
WILLIAM H. CLEAVELAND, ESQUIRE
Attorney at Law
P.O. Box 31
Roanoke, VA 24002

* * *

[33] THE COURT: If that is your decision, I would have you tell me in your own words at this time: What did you do that makes you feel that you're guilty of these two charges? Why do you propose to plead guilty here today?

THE DEFENDANT: For buying my uncle a firearm.

THE COURT: So tell me more about that. I don't know all the facts of the case like the rest of you do. Did you at some point decide to go to some firearm dealer, and was it Franklin County, and buy a firearm, a firearm or several firearms?

THE DEFENDANT: Henry County.

THE COURT: Henry County?

THE DEFENDANT: Yes, sir.

THE COURT: And you went to the firearm dealer to buy a firearm for your uncle?

THE DEFENDANT: Yes, sir.

THE COURT: Had he paid you for it beforehand?

THE DEFENDANT: He wrote me a check for it, correct, but it wasn't deposited.

THE COURT: And I don't know if it's important, but did you know that you weren't supposed to do that, that you're supposed to just buy a firearm for yourself, you can't be a straw purchaser, you can't buy a firearm for someone else?

[34] THE DEFENDANT: No, I didn't know I was breaking the law, Your Honor. I'm not familiar — I thought I was familiar with a straw purchase, and we looked into it, and that's why I thought it was okay what I did, because I knew that we were legally transferring it through a firearms dealer in Pennsylvania, so I thought what we did was okay.

THE COURT: You understand now, though, you can't buy a firearm for someone else? Even if you didn't know about the illegality of the transaction, you can still be held responsible under these charges.

THE DEFENDANT: I'm aware now, yes, sir.

THE COURT: And are you also aware that the dealer was expected to keep records to reflect who actually had the gun, and that your misstatements may have caused the dealer to improperly maintain those records?

THE DEFENDANT: I'm aware now.

THE COURT: And you say all this took place in Henry County?

THE DEFENDANT: Yes, sir, a gun store in Henry County.

THE COURT: Mr. Cleaveland, you indicated a moment ago that you wished to ask Mr. Abramski some questions to further illustrate his thinking and his reasoning in making his pleas today. Now would be an appropriate time for those questions, that exchange.

[35] MR. CLEAVELAND: Thank you, Your Honor. And a couple of them, frankly, we just covered.

I just wanted to mention, as you mentioned, Bruce, when you originally went to Franklin — or Henry County, you didn't know that you were breaking the law at that point; is that fair to say?

THE DEFENDANT: That's correct. I was not aware I was breaking the law.

MR. CLEAVELAND: You had conversations with your uncle, and you were the one that explained to him,

because he was asking you about whether a Glock pistol was one that would be satisfactory, and so you gave him your experience. And so when you offered — you actually made an offer to purchase it, because you could get a discount, get it cheaper?

THE DEFENDANT: Uh-huh.

MR. CLEAVELAND: And he agreed that that would be fine for you to do; is that right?

THE DEFENDANT: That's correct. It was my decision.

MR. CLEAVELAND: In the course of doing that, I understand he contacted some federal firearms licensed dealers in Pennsylvania, to be sure about the legality of the transfer in Pennsylvania; is that correct?

THE DEFENDANT: That's correct. They told us that would be the right thing to do.

MR. CLEAVELAND: And he communicated that to you; is [36] that right?

THE DEFENDANT: Uh-huh.

MR. CLEAVELAND: Is that the reason why, initially, when you went to Henry County, you thought you had to be the buyer in Virginia in order to be the transferor in Pennsylvania?

THE DEFENDANT: True. Pennsylvania told me I couldn't transfer the gun to my uncle in Pennsylvania if I didn't buy it here.

MR. CLEAVELAND: And so that's — we concede those are all the facts.

And when Judge Conrad indicated to us that the transaction in Pennsylvania was not a legal defense, we were essentially left with the fact of what you knew, and that was that you had agreed to purchase a gun in Virginia for your uncle, and deliver it to him there in Pennsylvania; is that right?

THE DEFENDANT: Yes, sir.

MR. CLEAVELAND: These legal issues, and the other questions about the previous rulings of the Court, have those, all together, brought you to the point where you understand that what the government says you did — and understanding that ignorance of the law is no defense — that it was appropriate to enter this guilty plea today conditionally so that you could appeal the legal issues to a higher court?

[37] THE DEFENDANT: Yes, sir.

MR. CLEAVELAND: Okay. Thank you, Your Honor. I appreciate that.

THE COURT: Mr. Cleaveland, you gentlemen have a seat. At this point we'll hear from Mr. Wolthuis as to

what evidence he would have offered if the matter had gone forward.

MR. WOLTHUIS: Thank you, Your Honor. If there's no objection, we'll proceed by proffer.

THE COURT: Proffer satisfactory, Mr. Cleaveland?

MR. CLEAVELAND: Yes, sir, it is. That's fine.

MR. WOLTHUIS: Your Honor, the venue for this case has established that the FFL, or the gun store that Mr. Abramski just referenced, is located in Collinsville, Virginia, in the Western Judicial District of Virginia.

The FFL at that location is an individual by the name of Mark Tosh, who is the president of Town Gun, Inc., doing business as Town Police Supply. They are an FFL. They are required to keep certain records pursuant to their FFL, which includes the keeping Forms 4473 and A&R, acquisitions and dispositions, record books.

As Mr. Abramski has said, the government's evidence, had we gone to trial, would be that, during the month of November, there were conversations between the defendant and his uncle in Pennsylvania about the advisability of procuring a Glock firearm. And Mr. Abramski indicated that he felt he could get [38] the gun at a discount, at an advantage price here in Virginia. After considering that, his uncle decided he would take the defendant up on his offer, and that he would agree to have Mr. Abramski buy this gun for him.

He wrote a check to Mr. Abramski in the amount of $400, dated November the 15th, 2009, and in the memo line referenced that it was for a "Glock 19 handgun."

Two days later, after the check had been executed, the defendant went to Town Police Supply for the purpose of purchasing that Glock, and, as it turns out, another rifle for himself.

At that time, he represented himself to the firearms dealer as the actual purchaser, even though the form itself makes it clear that if you are not buying this gun for yourself, you are not the actual purchaser. Even with that warning, Mr. Abramski answered the question in the affirmative, that he was the actual purchaser.

At another place on the form, it advises that if you are buying this gun for another person, that that could constitute a felony under federal law. That is part of the certificate which Mr. Abramski certified that he knew and understood.

Following that transaction, he went back — or he went to Pennsylvania and closed the deal.

One of the important witnesses that would have testified in this case, had it gone to trial, would have been the uncle, [39] Angel Danny Alvarez, who is here in the courtroom as we speak today. Following the investigation, the authorities spoke to Alvarez, and, eventually, he was subpoenaed to the grand jury. And he was cooperative with the investigators throughout this entire process, even

though he considered the defendant and his family to be family and friends, and it was difficult for him to say some of these things. But he did not waiver from the truth, at least certainly as we know it.

And if this case were to go to trial, it would be our expectation, based on his prior testimony and prior interviews, that he would confirm that he was interested in getting this gun, and eventually was interested in getting his nephew to buy him this gun at a favorable price, and that he, in fact, wrote the check on the 15th, having agreed for his nephew to get him the gun.

He would go on to say that he was very concerned for himself that he do things by the book there in Pennsylvania, and he consulted with gun dealers there, and that following that, once Mr. Abramski had made this straw purchase, that they met in Pennsylvania on the 21st of November, that they went to an FFL, as required under the laws of Pennsylvania, and that they transferred the gun from Mr. Alvarez — excuse me, from the defendant, Mr. Abramski, to Mr. Alvarez, according to state law in Pennsylvania.

And I would proffer to the Court, or introduce to the [40] Court, two documents that were actually executed by Mr. Alvarez and Mr. Abramski, one being an "Application/ Record of Sale" under the Pennsylvania State Police form, the other being a receipt from Spaz's Gun Shop, an FFL, in which they paid a $25 fee for the transfer of gun ownership on the 21st day of November 2009.

Appendix F

THE COURT: Hearing no objection, we'll have those two documents marked as Government's 1 and 2.

(Government's Exhibit Numbers 1 and 2 were marked for identification.)

MR. WOLTHUIS: Going to the materiality of the misstatement, obviously, had the defendant told the FFL in Virginia that he was not buying this gun for himself, but was, in fact, buying it for another, the deal could not have gone through, so, therefore, the misrepresentation as to the actual buyer was material.

As it relates to the keeping of the false record, having falsely filled out the 4473 as to the identity of the actual purchaser of this gun, it caused the firearms dealer to falsely maintain the records of that transaction, as well as their entry in the acquisitions and dispositions logbook they're required to maintain.

That would be our summary.

THE COURT: I take it, from that last statement, that there's no question but that there's no evidence that the [41] government is aware of that Mr. Abramski told the firearms dealer that they hoped to validate the transaction by having a lawful transfer of the firearm from himself to his uncle in Pennsylvania?

MR. WOLTHUIS: Your Honor, here in the building today are four individuals from the FFL in Collinsville who would testify that, under their rules of operation at

the Town Police Supply, they are very vigilant, and had there been any hint or indication or even inquiry that he, in fact, may have been purchasing the gun for another, that the gun transaction would not or could not have gone forward, either as a matter of law or as a matter of their store's policy.

And I would also finally add that the reason for the advantageous price being available to the defendant, Mr. Abramski, was because of a police discount program that Glock runs through this dealership, where sworn law enforcement officers and other first responders can get up to a 25 percent discount on the purchase of Glock handguns.

In this case, Mr. Abramski represented, by tendering to the clerks at the store, a Roanoke City Police ID; this being in November of 2009, when he, in fact, had been separated from the Roanoke City Police force in December of 2007, and had no relationship with the Roanoke Police force, and was not authorized to use that identity — or that identification card for any purpose at that time.

[42] THE COURT: Thank you, Mr. Wolthuis.

Mr. Cleaveland, let me ask the two of you to come back to the podium, please.

Mr. Cleaveland, without agreeing as to its legal import, would you agree that the statement Mr. Wolthuis has offered as to the facts of the case would be an accurate statement as to what might have been adduced if the matter went forward?

MR. CLEAVELAND: Yes, I do. And if it's all right, if I could make one comment. It is my understanding one of the things that Mr. Alvarez would acknowledge was, in discussions with multiple federal firearms dealers in Pennsylvania to determine the legality of that transfer, the information related to the purchase in Virginia was made known, and at no time did any of them suggest that that was a problem, for the purchase in Virginia to take place and transfer to be made.

So with that information, he did explain that to Mr. Abramski. And so that was the reason why, when he went to Collinsville and conducted the transaction, he didn't feel the need to investigate further and ask; Mr. Alvarez had already talked to three separate dealers in Pennsylvania. And that was kind of the focus of where they thought the ultimate test of legality was, was as long as it was being done legally at that end, then he had to be the buyer in order to be the transferor in Pennsylvania.

* * * *

No. 12-1493

IN THE

Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 21, 2013
CERTIORARI GRANTED OCTOBER 15, 2013

250111

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SUPPLEMENTAL APPENDIX -
ATF FORM 4473 - FIREARMS TRANSACTION RECORD
PART I - OVER-THE-COUNTER SA-1

S. Department of Justice
reau of Alcohol, Tobacco, Firearms and Explosives

Firearms Transaction Record Part I - Over-the-Counter

Transferor's Transaction Serial Number (If any)
D398-5
D427

NG: You may not receive a firearm if prohibited by Federal or State law. The information you provide will ... to determine whether you are prohibited under law from receiving a firearm. Certain violations of the Gun ntrol Act, 18 U.S.C. §§ 921 et. seq., are punishable by up to 10 years imprisonment and/or up to a $250,000 fine.

ypers in original only. All entries must be handwritten in ink. Read the Notices, Instructions, and Definitions on k form. "PLEASE PRINT."

Section A - Must Be Completed Personally By Transferee (Buyer)

Transferee's Full Name: Last Name	First Name	Middle Name (If no middle name, state "NMN")
ADAMSKI JR	BRUCE	JAMES

Current Residence Address (U.S. Postal abbreviations are acceptable. Cannot be a post office box.)

Number and Street Address	City	County	State	ZIP Code
[redacted]	ROCKY MOUNT	FRANKLIN	VA	24151

Place of Birth: U.S. City and State	-OR- Foreign Country	4. Height: Ft.	In.	5. Weight (Lbs.)	6. Gender: Male ☐ Female ☐	7. Birth Date: Month	Day	Year
NEW YORK NY	N/A	6	2	205		[redacted]	[redacted]	1984

8. Social Security Number (Optional, but will help prevent misidentification): [redacted]

9. Unique Personal Identification Number (UPIN) if applicable (See Instructions for Question 9.) N/A

10. Race (Ethnicity) (Check one or more boxes. See Instructions for Question 10.)

- ☐ American Indian or Alaska Native
- ☐ Black or African American
- ☐ Native Hawaiian or Other Pacific Islander
- ☒ Hispanic or Latino
- ☐ Asian
- ☒ White

11. Answer questions 11.a. thru exceptions) through 11.l. and 12 if applicable) by checking or marking "yes" or "no" in the boxes to the right of the questions.

	Yes	No
a. Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you. (See Instructions for Question 11.a.) Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b.	☒	☐
b. Are you under indictment or information in any court for a felony, or any other crime, for which the judge could imprison you for more than one year? (See Instructions for Question 11.b.)	☐	☒
c. Have you ever been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? (See Instructions for Question 11.c.)	☐	☒
d. Are you a fugitive from justice?	☐	☒
e. Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?	☐	☒
f. Have you ever been adjudicated mentally defective (which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs) OR have you been committed to a mental institution? (See Instructions for Question 11.f.)	☐	☒
g. Have you been discharged from the Armed Forces under dishonorable conditions?	☐	☒
h. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? (See Instructions for Question 11.h.)	☐	☒
i. Have you ever been convicted in any court of a misdemeanor crime of domestic violence? (See Instructions for Question 11.i.)	☐	☒
j. Have you ever renounced your United States citizenship?	☐	☒
k. Are you an alien illegally in the United States?	☐	☒
l. Are you a nonimmigrant alien? (See Instructions for Question 11.l.) If you answered "no" to this question, do NOT respond to question 12 and proceed to question 13.	☐	☒
12. If you are a nonimmigrant alien, do you fall within any of the exceptions set forth in the instructions? (If "yes," the licensee must complete question 20d.) (See Instructions for Question 12.) If question 11.l. is answered with a "no" response, then do NOT answer or respond to question 12 and proceed to question 13.	☐	☐

13. What is your State of residence (If any)? (See Instructions for Question 13.)	14. What is your country of citizenship? (List/check more than one, if applicable. If you are a citizen of the United States, proceed to question 15.)	15. If you are not a citizen of the United States, what is your U.S.-issued alien number or admission number?
VA	☒ United States of America ☐ Other (Specify)	N/A

I certify that my answers to Section A are true, correct, and complete. I have read and understand the Notice, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. if I am not the actual buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I understand that a person who answers "yes" to any of the questions 11.b. through 11.k. is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 11.l. is prohibited from purchasing or receiving a firearm, unless the person also answers "yes" to question 12. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of law (*See Instructions for Question 18*).

16. Transferee's/Buyer's Signature	17. Certification Date
B Fillmore	11-17-09

Section B - Must Be Completed By Transferor (Seller)

18. Type of firearm(s) to be transferred (*check or mark all that apply*):

☑ Handgun ☑ Long Gun (*rifles or shotguns*) ☐ Other Firearm (*Frame, Receiver, etc. See Instructions for Question 18.*)

19. If sale at a gun show or other qualifying event.

Name of Event _____

City, State _____

20a. Identification: (*e.g., Virginia Driver's license (VA DL) or other valid government-issued photo identification.*) (*See Instructions for Question 20.a.*)

Issuing Authority and Type of Identification	Number on Identification	Expiration Date of Identification (*if any*) Month	Day	Year
VADL	[redacted]	09	13	2017

20b. Alternate Documentation (*If driver's license or other identification document does not show current residence address*)

20c. **All Aliens:** Type and dates of documents that establish 90-day residency (*e.g., utility bills or lease agreements*). (*See Instructions for Question 20.c.*)

Type(s) of Document	Date(s) of residence indicated on documents

20d. **Nonimmigrant Aliens Must Provide:** Type of documentation showing an exception to the nonimmigrant alien prohibition. (*See Instructions for Question 20.d.*)

Questions 21, 22, or 23 Must Be Completed Prior To The Transfer Of The Firearm(s) (*See Instructions for Questions 21, 22 and 23.*)

21a. Date the transferee's identifying information in Section A was transmitted to NICS or the appropriate State agency: (*Month/Day/Year*)

Month	Day	Year
11	17	2009

21b. The NICS or State transaction number (*if provided*) was:

G34900

21c. The response initially provided by NICS or the appropriate State agency was:

☑ Proceed ☐ Delayed
☐ Denied
☐ Cancelled

(*The firearm(s) may be transferred on* _____ *(MM/DD/YYYY) if State law permits (optional)*)

21d. If initial NICS or State response was "*Delayed,*" the following response was received from NICS or the appropriate State agency:

☐ Proceed _____ (*date*)
☐ Denied _____ (*date*)
☐ Cancelled _____ (*date*)
☐ No resolution was provided within 3 business days.

21e. (*Complete if applicable.*) After the firearm was transferred, the following response was received from NICS or the appropriate State agency on:

_____ (*date*). ☐ Proceed ☐ Denied ☐ Cancelled

21f. The name and Brady identification number of the NICS examiner (*Optional*)

_____ (*name*) _____ (*number*)

22. ☐ No NICS check was required because the transfer involved only NFA firearm(s). (*See instructions for Question 22.*)

23. ☐ No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS (*See Instructions for Question 23.*)

Issuing State and Permit Type	Date of Issuance (*if any*)	Expiration Date (*if any*)	Permit Number (*if any*)

Section C - Must Be Completed Personally By Transferee (Buyer)

If the transfer of the firearm(s) takes place on a different day from the date that the transferee (*buyer*) signed Section A, the transferee must complete Section C immediately prior to the transfer of the firearm(s). (*See Instructions for Question 24 and 25.*)

I certify that my answers to the questions in Section A of this form are still true, correct and complete.

24. Transferee's/Buyer's Signature	25. Recertification Date
B Fillmore	11 17 09

Transferor (Seller) Continue to Next Page

STAPLE IF PAGES BECOME SEPARATED

Section D - Must Be Completed By Transferor (Seller)

26. Manufacturer and/or Importer (If the manufacturer and importer are different, the FFL should include both.)	27. Model	28. Serial Number	29. Type (pistol, revolver, rifle, shotgun, receiver, frame, etc.) (See instructions for question 29)	30. Caliber or Gauge
Glock	19	NYB319	Pistol	9mm
Ruger	SR556	590-03770	Rifle	5.56 mm

30a. Total Number of Firearms (Please handwrite by printing e.g. one, two, three, etc. Do not use numerals.) ONE TWO

30b. Is any part of this transaction a Private Redemption? ☐ Yes ☑ No

30c. For Use by FFL (See Instructions for Question 30c.)

Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days

31. Trade/corporate name and address of transferor (Hand stamp may be used.)

TOWN GUN SHOP, INC.
TOWN POLICE SUPPLY
3985 VIRGINIA AVENUE
P.O. BOX 417
COLLINSVILLE, VA 24078

32. Federal Firearms License Number (Must contain at least first three and last five digits of FFL Number X-XX-XXXXX.) (Hand stamp may be used.)

1-54-089-01-1H-20042

The Person Transferring The Firearm(s) Must Complete Questions 33-36. For Denied/Cancelled Transactions, The Person Who Completed Section B Must Complete Questions 33-35.

I certify that my answers in Sections B and D are true, correct, and complete. I have read and understood the Notices, Instructions, and Definitions on ATF Form 4473. On the basis of: (1) the statements in Section A (and Section C if the transfer does not occur on the day Section A was completed); (2) my verification of the identification noted in question 30a (and my reverification at the time of transfer if the transfer does not occur on the day Section A was completed); and (3) the information in the current State Laws and Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.

33. Transferor's/Seller's Name (Please print)	34. Transferor's/Seller's Signature	35. Transferor's/Seller's Title	36. Date Transferred
Kay Mann	Kay Mann	manager	11-12-09

NOTICES, INSTRUCTIONS AND DEFINITIONS

Purpose of the Form: The information and certification on this form are designed so that a person licensed under 18 U.S.C. § 923 may determine if he or she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the buyer of certain restrictions on the receipt and possession of firearms. This form should only be used for sales or transfers where the seller is licensed under 18 U.S.C. § 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the seller must be familiar with the provisions of 18 U.S.C. §§ 921-931 and the regulations in 27 CFR Part 478. In determining the lawfulness of the sale or delivery of a long gun (rifle or shotgun) to a resident of another State, the seller is presumed to know the applicable State laws and published ordinances in both the seller's State and the buyer's State.

After the seller has completed the firearms transaction, he or she must make the completed, original ATF Form 4473 (which includes the Notices, General Instructions, and Definitions), and any supporting documents, part of his or her permanent records. Such Forms 4473 must be retained for at least 20 years. Filing may be chronological (by date), alphabetical (by name), or numerical (by transaction serial number), as long as all of the seller's completed Forms 4473 are filed in the same manner. FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED: If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not complete after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his or her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place should be separately retained in alphabetical (by name) or chronological (by date of transferee's certification) order.

If the buyer discovers that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and you or the buyer wish to make a record of your discovery, then photocopy the inaccurate face and make any necessary additions or revisions to the photocopy. You only should make changes to Sections B and D. The buyer should only make changes to Sections A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of your permanent records.

Over-the-Counter Transactions: The sale or other disposition of a firearm by a seller to a buyer, at the seller's licensed premises. This includes the sale or other disposition of a rifle or shotgun to a nonresident buyer on such premises.

State Laws and Published Ordinances: The publication (ATF P 5300.5) of State firearms laws and local ordinances ATF distributes to licensees.

Importation of Firearms: The State or Commerce Department may require you to obtain a license prior to import.

[illegible] A

Question 1. Transferor's Full Name: The buyer must personally complete Section A of this form and certify (sign) that the answers are true, correct, and complete. However, if the buyer is unable to read and/or write, the answers (other than the signature) may be completed by another person, including the seller. Two persons (other than the seller) must then sign as witnesses to the buyer's answers and signature.

When the buyer of a firearm is a corporation, company, association, partnership, or other such business entity, an officer authorized to act on behalf of the business must complete Section A of the form with his or her personal information, sign Section A, and attach a written statement, executed under penalties of perjury, stating: (A) the firearm is being acquired for the use of and will be the property of that business entity and (B) the name and address of that business entity.

If the buyer's name in question 1. is illegible, the seller must print the buyer's name above the name written by the buyer.

Question 2. Current Residence Address: U.S. Postal abbreviations are acceptable. *(e.g., IL, Rd., Dr., Pk, NC, etc.)*. Address cannot be a post office box. County and Parish are one and the same.

If the buyer is a member of the Armed Forces on active duty acquiring a firearm in the State where his or her permanent duty station is located, but does not reside at his or her permanent duty station, the buyer must list both his or her permanent duty station address and his or her residence address in response to question 2. If you are a U.S. citizen with two States of residence, you should list your current residence address in response to question 2 (e.g., *If you are buying a firearm while staying at your weekend home in State X, you should list your address in State X in response to question 2*).

Question 9. Unique Personal Identification Number (UPIN): For purchasers approved to have information maintained about them in the FBI NICS Voluntary Appeal File, NICS will provide them with a Unique Personal Identification Number, which the buyer should record in question 9. The licensee may be asked to provide the UPIN to NICS or the State.

Question 10. Race (Ethnicity): Any other race or ethnicity that does not fall within those indicated, please select the closest representation.

Question 11.a. Actual Transferee/Buyer: For purposes of this form, you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself (e.g., *redeeming the firearm from pawn/retrieving it from consignment, firearm raffle winner)*. You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party. ACTUAL TRANSFEREE/BUYER EXAMPLES: Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is NOT THE ACTUAL TRANSFEREE/BUYER of the firearm and must answer "NO" to question 11.a. The firearm may not transfer the firearm to Mr. Jones. However, if Mr. Brown goes to buy a firearm with his own money to give to Mr. Black as a present, Mr. Brown is the actual transferee/buyer of the firearm and should answer "YES" to question 11.a. However, you may not transfer a firearm to any person you know or have reasonable cause to believe is prohibited under 18 U.S.C. § 922(g), (n), or (x). *Please note:* EXCEPTION: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b.

Questions 11.b. - 11.l. Definitions of Prohibited Persons: Generally, 18 U.S.C. § 922 prohibits the shipment, transportation, receipt, or possession in or affecting interstate commerce of a firearm by one who: has been convicted of a misdemeanor crime of domestic violence; has been convicted of a felony, or any other crime, punishable by imprisonment for a term exceeding one year *(this does not include State misdemeanors punishable by imprisonment of two years or less)*; is a fugitive from justice; is an unlawful user of, or addicted to, marijuana or any depressant, stimulant, or narcotic drug, or any other controlled substance; has been adjudicated mentally defective or has been committed to a mental institution; has been discharged from the Armed Forces under dishonorable conditions; has renounced his or her U.S. citizenship; is an alien illegally in the United States or a nonimmigrant alien; or is subject to certain restraining orders. Furthermore, section 922 prohibits the shipment, transportation, or receipt in or affecting interstate commerce of a firearm by one who is under indictment or information for a felony, or any other crime, punishable by imprisonment for a term exceeding one year.

Question 11.b. Under Indictment or Information or Convicted in any Court: An indictment, information, or conviction in any Federal, State, or local court. An information is a formal accusation of a crime verified by a prosecutor.

EXCEPTION to 11.c. and 11.l.: A person who has been convicted of a felony, or any other crime, for which the judge could have imprisoned the person for more than one year, or who has been convicted of a misdemeanor crime of domestic violence, is not prohibited from purchasing, receiving, or possessing a firearm if: (1) under the law of the jurisdiction where the conviction occurred, the person has been pardoned, the conviction has been expunged or set aside, or the person has had their civil rights *(the right to vote, sit on a jury, and hold public office)* taken away and later restored AND (2) the person is not prohibited by the law of the jurisdiction where the conviction occurred from receiving or possessing firearms. Persons subject to this exception should answer "no" to 11.c. or 11.l., as applicable.

Question 11.f. Adjudicated Mentally Defective: A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) is a danger to himself or to others; or (2) lacks the mental capacity to contract or manage his own affairs. This term shall include: (1) a finding of insanity by a court in a criminal case; and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility.

Committed to a Mental Institution: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution. Please also refer to Question 11.e. for the definition of a prohibited person.

EXCEPTION to 11.f. NICS Improvement Amendments Act of 2007: A person who has been adjudicated as a mental defective or committed to a mental institution is not prohibited if: (1) the person was adjudicated or committed by a department or agency of the Federal Government, such as the United States Department of Veteran's Affairs ("VA") (as opposed to a State court, State board, or other lawful State authority); and (2) either: (a) the person's adjudication or commitment for mental incompetency was set-aside or expunged by the adjudicating/committing agency; (b) the person has been fully released or discharged from all mandatory treatment, supervision, or monitoring by the agency; or (c) the person was found by the agency to no longer suffer from the mental health condition that served as the basis of the initial adjudication. Persons who fit this exception should answer "no" to Item 11.f. This exception does not apply to any person who was adjudicated to be not guilty by reason of insanity, or based on lack of mental responsibility, or found incompetent to stand trial, in any criminal case or under the Uniform Code of Military Justice.

Question 11.h. Definition of Restraining Order: Under 18 U.S.C. § 922, firearms may not be sold to or received by persons subject to a court order that: (A) was issued after a hearing which the person received actual notice of and had an opportunity to participate in; (B) restrains such person from harassing, stalking, or threatening an intimate partner or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury. An "intimate partner" of a person is: the spouse or former spouse of the person, the parent of a child of the person, or an individual who cohabitates or cohabitated with the person.

Question 11.i. Definition of Misdemeanor Crime of Domestic Violence: A Federal, State, local, or tribal offense that is a misdemeanor under Federal, State, or tribal law and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with, or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. The term includes all misdemeanors that have as an element the use or attempted use of physical force or the threatened use of a deadly weapon *(e.g., assault and battery)*, if the offense is committed by one of the defined parties. *(See Exception to 11.c. and 11.l.)* A person who has been convicted of a misdemeanor crime of domestic violence also is not prohibited unless: (1) the person was represented by a lawyer or gave up the right to a lawyer; or (2) if the person was entitled to a jury, was tried by a jury, or gave up the right to a jury trial. Persons subject to this exception should answer "no" to 11.i.

Question 11.l. "Nonimmigrant Alien": An alien in the United States in a nonimmigrant classification. The definition includes, among others, persons traveling temporarily in the United States for business or pleasure; persons studying in the United States who maintain a residence abroad; and certain foreign workers. The definition does NOT include permanent resident aliens.

Sale of Firearms to Legal Aliens: Even if a nonimmigrant alien can establish that he or she has a U.S.-issued alien number or admission number and has resided in a State for at least 90 continuous days immediately prior to the date of

...he or she is prohibited from receiving a firearm unless he or she falls within an exception to the nonimmigrant alien prohibition. *(See Question 11.c. and Exception to 11.l.)* If a nonimmigrant alien claims to fall within one of these exceptions by answering "yes" to question 12, he or she must provide the ... with documentation of the exception *(e.g., hunting license/permit;* ... If the documentation is a hunting license/permit, the firearm must ... it has not expired. An expired hunting license/permit does not qualify for the exception. A licensee MUST complete and may attach a copy of the documentation to ATF Form 4473.

EXCEPTION to 11.l.: A nonimmigrant alien is not prohibited from purchasing, receiving, or possessing a firearm if the alien: (1) is in possession of a hunting license or permit lawfully issued in the United States; or (2) has received a waiver from the prohibitions from the Attorney General of the United States. *(See 18 U.S.C. § 922(y)(2) for additional exceptions.)* Persons subject to one of these exceptions should answer "yes" to questions 11.l. and 12 and provide a copy of the hunting license or letter granting the waiver, which must be recorded in 20.d. If the Transferee (Buyer) answered "yes" to this question, the licensee MUST complete 20.d.

Question 12. Exceptions to Nonimmigrant Alien Response: If question 11.l. is answered with a "no" response, then do NOT respond to question 12 and proceed to question 13. If response is "yes," then licensee must complete question 20.d., and may attach a copy.

Question 13. State of Residence: The State in which an individual resides. An individual resides in a State if he or she is present in a State with the intention of making a home in that State. If an individual is a member of the Armed Forces on active duty, his or her State of residence also is the State in which his or her permanent duty station is located. An alien who is legally in the United States is a resident of a State only if the alien is residing in the State and has resided in the State continuously for at least 90 days immediately prior to the date of sale or delivery of a firearm.

If you are a U.S. citizen with two States of residence, you should list your current residence address in response to question 2 *(e.g., if you are buying a firearm while staying at your weekend home in State X, you should list your address in State X in response to question 2.)* If you are not a citizen of the United States, you only have a State of residence if you have resided in a State for at least 90 continuous days immediately prior to the date of this sale.

Question 14. Certification Definition of Engaged in the Business: Under 18 U.S.C. § 922 (a)(1), it is unlawful for a person to engage in the business of dealing in firearms without a license. A person is engaged in the business of dealing in firearms if he or she devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms. A license is not required of a person who only makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his or her personal collection of firearms.

Section B

Question 15. Type of Firearm(s): Check all boxes that apply. "Other" refers to frames, receivers and other firearms that are not either handguns or long guns (rifles or shotguns), such as firearms having a pistol grip that expel a shotgun shell, or National Firearms Act (NFA) firearms.

If a frame or receiver can only be made into a long gun *(rifle or shotgun)*, it is still a frame or receiver not a handgun or long gun. However, they still are "firearms" by definition, and subject to the same GCA limitations as any other firearms. See Section 921(a)(3)(b). 18 U.S.C. Section 922(b)(1) makes it unlawful for a licensee to sell any firearm other than a shotgun or rifle to any person under the age of 21. Since a frame or receiver for a firearm, to include one that can only be made into a long gun, is a "firearm other than a shotgun or rifle," it cannot be transferred to anyone under the age of 21. Also, note that multiple sales forms are not required for frames or receivers of any firearms, or pistol grip shotguns, since they are not "pistols or revolvers" under Section 923(g)(3)(A).

...n 19. Gun Shows: If sale at gun show or other qualifying event ...ed by any national, State, or local organization, as authorized by 27 CFR § 478.100, the seller must record the name of event and the location *(city and State)* of the sale in question 19.

Question 20a. Identification: List issuing authority *(e.g., State, County or Municipality)* and type of identification presented *(e.g., Virginia driver's license (VA DL), or other valid government-issued identification).*

Know Your Customer: Before a licensee may sell or deliver a firearm to a nonlicensee, the licensee must establish the identity, place of residence, and age of the buyer. The buyer must provide a valid government-issued photo identification to the seller that contains the buyer's name, residence address, and date of birth. The licensee must record the type, identification number, and expiration date *(if any)* of the identification in question 20.a. A driver's license or an identification card issued by a State in place of a license is acceptable. Social Security cards are not acceptable because no address, date of birth, or photograph is shown on the card. A combination of government-issued documents may be provided. For example, if a U.S. citizen has two States of residence and is trying to buy a handgun in State X, he may provide a driver's license *(showing his name, date of birth, and photograph)* issued by State Y and another government-issued document *(such as a tax document)* from State X showing his residence address. If the buyer is a member of the Armed Forces on active duty acquiring a firearm in the State where his or her permanent duty station is located, but he or she has a driver's license from another State, you should list the buyer's military identification card and official orders showing where his or her permanent duty station is located in response to question 20.a.

Question 20.b. Alternate Documentation: Licensees may accept a combination of valid government-issued documents to satisfy the identification document requirements of the law. The required valid government-issued photo identification document bearing the name, photograph, and date of birth of transferee may be supplemented by another valid, government-issued document showing the transferee's residence address. This alternate documentation should be recorded in question 20.b., with issuing authority and type of identification presented. A combination of government-issued documents may be provided. For example, if a U.S. citizen has two States of residence and is trying to buy a handgun in State X, he may provide a driver's license *(showing his name, date of birth, and photograph)* issued by State Y and another government-issued document *(such as a tax document)* from State X showing his residence address.

Question 20.c. Documentation for All Aliens:

Sale of Firearms to Legal Aliens: A buyer who is not a citizen of the United States must provide additional documentation (beyond a valid government-issued photo identification that contains the buyer's name, residence address, and date of birth) to establish that he or she has resided in a State continuously for at least 90 days immediately prior to the date of the sale. *(See Question 13.)* Examples of appropriate documents to establish State residency are utility bills from each of the last 3 months immediately prior to the sale or a lease agreement that demonstrates 90 days of residency immediately prior to the sale. A licensee may attach a copy of the documentation to ATF Form 4473, rather than record the type of documentation in question 20.c. Acceptable documentation to prove 90-day continuous residency must be original documentation *(e.g., utility bills, current bank statements, real receipts, mortgage payments, lease agreements, personal property tax bills, documents issued by Federal, State, or local government agencies, first-class mail issued by government agency, insurance policies, or bill with current address or major credit card bill).*

Question 20.d. Documentation for Nonimmigrant Aliens: See instructions for Question 11.l. Types of acceptable documents would include a valid State-issued [illegible]

Question(s) 21, 22, 23, NICS BACKGROUND CHECKS: 18 U.S.C. § 922(t) requires that prior to transferring any firearm to an unlicensed person, a licensed importer, manufacturer, or dealer must first contact the National Instant Criminal Background Check System (NICS). NICS will advise the licensee whether the system finds any information that the purchaser is prohibited by law from possessing or receiving a firearm. For purposes of this form, contacts to NICS include contacts to State agencies designated to conduct NICS checks for the Federal Government. WARNING: Any seller who transfers a firearm to any person they know or have reasonable cause to believe is prohibited from receiving or possessing a firearm violates the law, even if the seller has complied with the background check requirements of the Brady law.

After the buyer has completed Section A of the form and the licensee has completed questions 18-20, and before transferring the firearm, the licensee must contact NICS *(need below for NICS check exceptions.)* However, the licensee should NOT contact NICS and should stop the transaction if: the buyer answers "no" to question 11.a.; the buyer answers "yes" to any question in 11.b-11.i., unless the buyer only has answered "yes" to question 11.i. and also answers "yes" to question 12; or the buyer is unable to provide the documentation required by question 20.a, b, c, or d.

At the time that NICS is contacted, the licensee must record in question 21.a-c: the date of contact, the NICS *(or State)* transaction number, and the initial response provided by NICS or the State. The licensee may record the Missing Disposition Information (MDI) data in 21.e. that NICS provides for delayed transactions *(States do not provide this number)*. If the licensee receives a *"delayed"* response, before transferring the firearm, the licensee must record in question 21.d. any response later provided by NICS or the State or that no resolution was provided within 3 business days. If the licensee receives a response from NICS or the State after the firearm has been transferred, he or she must record this information in question 21.e. Note: States acting as points of contact for NICS checks may use terms other than "proceed," *"delayed,"* "cancelled," or *"denied."* In such cases, the licensee should check the box that corresponds to the State's response. Some States may not provide a transaction number for denials. However, if a firearm is transferred within the three business day period, a transaction number is required.

NICS Responses: If NICS provides a *"proceed"* response, the transaction may proceed. If NICS provides a "cancelled" response, the seller is prohibited from transferring the firearm to the buyer. If NICS provides a *"denied"* response, the seller is prohibited from transferring the firearm to the buyer. If NICS provides a *"delayed"* response, the seller is prohibited from transferring the firearm unless 3 business days have elapsed and, before the transfer, NICS or the State has not advised the seller that the buyer's receipt or possession of the firearm would be in violation of law. (See 27 CFR § 478.102(a) for an example of how to calculate 3 business days.) If NICS provides a *"delayed"* response, NICS also will provide a Missing Disposition Information (MDI) date that calculates the 3 business days and reflects when the firearm(s) can be transferred under Federal law. States may not provide an MDI date. *Please note State law may impose a waiting period on transferring firearms.*

EXCEPTIONS TO NICS CHECK. A NICS check is not required if the transfer qualifies for any of the exceptions in 27 CFR § 478.102(d). Generally these include: (a) transfers where the buyer has presented the licensee with a permit or license that allows the buyer to possess, acquire, or carry a firearm, and the permit has been recognized by ATF as a valid alternative to the NICS check requirement; (b) transfers of National Firearms Act weapons approved by ATF; or (c) transfers certified by ATF as exempt because compliance with the NICS check requirements is impracticable. See 27 CFR § 478.102(d) for a detailed explanation. If the transfer qualifies for one of these exemptions, the licensee must obtain the documentation required by 27 CFR § 478.131. A firearm must not be transferred to any buyer who fails to provide such documentation.

Section C

Question 24 and 25. Transfer on a Different Day and Recertification: If the transfer takes place on a different day than the date that the buyer signed Section A, the licensee must again check the photo identification of the buyer at the time of transfer, and the buyer must complete the recertification in Section C at the time of transfer.

Section D

Immediately prior to transferring the firearm, the seller must complete all of the questions in Section D. In addition to completing this form, the seller must report any multiple sale or other disposition of pistols or revolvers on ATF Form 3310.4 (see 27 CFR § 478.126a).

Question(s) 26, 27, 28, 29 and 30, Firearm(s) Description: These blocks should be completed with the firearm(s) information. Firearms manufactured after 1968 should all be marked with a serial number. Should you acquire a firearm that is not marked with a serial number, you may answer question 28 with "NSN" (No Serial Number), "N/A" or "None."

If more than five firearms are involved in a transaction, the information required by Section D, questions 26-30, must be provided for the additional firearms on a separate sheet of paper, which must be attached to the ATF Form 4473 covering the transaction.

Types of firearms include: pistol, revolver, rifle, shotgun, receiver, frame and other firearms that are not either handguns or long guns (rifles or shotguns), such as firearms having a pistol grip that expel a shotgun shell or National Firearms Act (NFA) firearms.

Additional firearms purchases by the same buyer may not be added to the form after the seller has signed and dated it. A buyer who wishes to purchase additional firearms after the seller has signed and dated the form must complete a new ATF Form 4473. The seller must conduct a new NICS check.

Question 36c. This box is for the FFL's use in recording any information he or she finds necessary to conduct business.

Question 32 Federal Firearms License Number: Must contain at least the first three and last five digits of the FFL number, for instance X-XX-XXXXX.

Question 33-35 Transferor/Seller Information: For "denied" and "cancelled" NICS transactions, the person who completed Section B must complete Section D, questions 33-35.

Privacy Act Information

Solicitation of this information is authorized under 18 U.S.C. § 923(g). Disclosure of the individual's Social Security number is voluntary. The number may be used to verify the buyer's identity.

Paperwork Reduction Act Notice

The information required on this form is in accordance with the Paperwork Reduction Act of 1995. The purpose of the information is to determine the eligibility of the transferee to receive firearms under Federal law. The information is subject to inspection by ATF officers and is required by 18 U.S.C. §§ 922 and 923.

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ATF Form 4473 (5300.9) Part 1
Revised August 2008

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-1493

IN THE

Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

When a person buys a gun intending to later sell it to someone else, the government often prosecutes the initial buyer under 18 U.S.C. § 922(a)(6) for making a false statement about the identity of the buyer that is "material to the lawfulness of the sale." These prosecutions rely on the court-created "straw purchaser" doctrine, a legal fiction that treats the ultimate recipient of a firearm as the "actual buyer," and the immediate purchaser as a mere "straw man."

The lower courts uniformly agree that a buyer's intent to resell a gun to someone who cannot lawfully buy it is a fact "material to the lawfulness of the sale." But the Fourth, Sixth, and Eleventh Circuits have split with the Fifth and Ninth Circuits about whether the same is true when the ultimate recipient *can* lawfully buy a gun. The questions presented are:

1. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a fact "material to the lawfulness of the sale" of the firearm under 18 U.S.C. § 922(a)(6)?

2. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a piece of information "required . . . to be kept" by a federally licensed firearm dealer under 18 U.S.C. § 924(a)(1)(A)?

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The opinion of the court of appeals is reported at 706 F.3d 307. Pet. App. 1a-24a. The relevant rulings and judgment of the district court are unpublished and reprinted at Pet. App. 25a-27a and Pet. App. 28a-41a.

JURISDICTION

The court of appeals filed its opinion on January 23, 2013. Pet. App. 1a. On April 4, 2013, the Chief Justice extended the time to file a petition for a writ of certiorari to June 21, 2013. The petition for a writ of certiorari was filed on June 21, 2013 and granted on October 15, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(a)(6) provides:

> (a) It shall be unlawful . . . (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C. § 924(a)(1)(A) provides:

> (a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter . . . shall be fined under this title, imprisoned not more than five years, or both.

STATEMENT OF THE CASE

I. BACKGROUND OF THE GUN CONTROL ACT OF 1968.

The Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968), is the primary federal law regulating the purchase, sale, and possession of firearms. Among its provisions are two key restrictions on the possession and sale of firearms.

First, the statute makes it unlawful for certain categories of people to possess firearms. These groups of people, collectively called "prohibited persons," include juveniles, felons, fugitives, drug addicts, the mentally incompetent, and illegal aliens. *See* 18 U.S.C. § 922(g).

Second, the statute makes it unlawful to sell firearms to any person the seller knows or has reasonable cause to believe is a prohibited person. *See* 18 U.S.C. § 922(d).

As explained in more detail below, this provision initially applied only to sales by licensed gun dealers but was amended in 1986 to apply to all firearm sales. *See* Pub. L. No. 99-308, 100 Stat. 449, § 102 (1986).

The purpose of these two statutory provisions is "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Barrett v. United States*, 423 U.S. 212, 220 (1976) (quoting S. Rep. No. 90-1501 (1968)). The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has promulgated regulations that reaffirm these restrictions but do not expand them. *See* 27 C.F.R. § 478.99.

Aside from these statutes and regulations, there are no laws that limit when a licensed gun dealer may sell a gun to a qualified purchaser. Of critical importance to this case, there are no statutes or regulations that prohibit a gun dealer from selling a firearm to a buyer who, at the time of the sale, intends to resell the gun in the future.

The Gun Control Act also criminalizes certain false statements made to licensed gun dealers during the purchase of a firearm. Two of those provisions are at issue in this case.

First, 18 U.S.C. § 922(a)(6) makes it unlawful for a person buying a gun from a licensed dealer "knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive" the gun dealer "with respect to any fact material to the lawfulness of the sale."

Second, 18 U.S.C. § 924(a)(1)(A) makes it unlawful to "knowingly make[ ] any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter."

II. HISTORY OF THE STRAW PURCHASER DOCTRINE.

As noted above, when Congress first enacted the Gun Control Act in 1968, it prohibited licensed gun dealers from selling guns to prohibited persons. Pub. L. No. 90-618, § 102, 82 Stat. at 1220. But the law did not prohibit ordinary citizens (those who are not federally licensed gun dealers) from selling guns to prohibited persons. *Id.* Thus, in its initial form, the Gun Control Act did not bar a lawful gun buyer from purchasing a firearm with the intent to resell it to a prohibited person. Indeed, the statute did not even criminalize the sale of a firearm from a nonlicensee to a prohibited person. *Id.*

Congress long understood that the Gun Control Act of 1968 did not criminalize that conduct. For example, in 1975, during hearings concerning the impact of the Gun Control Act, Senator Birch Bayh discussed that "loophole" with Rex Davis, the Director of ATF:

> Senator BAYH: Is there anything in the law now which makes it illegal for me, as a citizen who is not in one of those categories proscribed from purchasing firearms, from going into your store and buying a hand weapon; going home and selling it to my father-in-law, who does fit into one of those categories, whose purchase from a dealer is illegal?

Mr. DAVIS: No, sir, there is no prohibition against the sale—by sale, we mean casual sale—of handguns between individuals. It does not matter—the only restriction would be that if you knew he was not a resident of that State, then it would be illegal. But that would be the only restriction placed on the sale or transfer of weapons between individuals.

Senator BAYH: Is that not one of the biggest loopholes under the law? It is not illegal for me, as an individual? This allows, it seems to me, the wrong persons to have ready access. Why bother to risk stealing a weapon? If you have a felon who has just come out of the "big house" who wants to commit a felony, he can simply go to a relative and say, Sam, go in there and buy a handgun; here is the money. The relative buys it. There is nothing illegal. He sells it to the felon. There is nothing illegal about it—and the felon has the best gun in the town.

Mr. DAVIS: Yes, sir, there is no question that this represents a gap in the law.[1]

---

1. ATF Director Davis suggested in his testimony that it would be illegal to sell a gun to someone who is a nonresident of the state. However, the Gun Control Act provides a separate statutory means for individuals to buy guns and then resell them to out-of-state residents. To do so, the initial buyer must purchase the gun in his home state and then travel to the non-resident's home state and transfer the firearm through a licensed gun dealer in that state, who obtains the necessary paperwork and performs the required background check. *See* 18 U.S.C. §§ 922(a)(3), (a)(5), (b)(3), (d); 27 C.F.R. §§ 478.29, 478.30; *see generally* Federal Firearms Regulations Reference Guide, ATF Publ'n 5300.4, at 177 (2005).

Oversight of 1968 Gun Control Act–The Escalating Rate of Handgun Violence: Hearing on S. Res. 72, § 12 Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary, 94th Cong. 118 (1975).

When Congress failed to close this perceived loophole in the years after the Gun Control Act's passage, the lower federal courts sought to close it themselves by creating the straw purchaser legal doctrine. Those courts reasoned that "[i]f an ineligible buyer could simply use a 'straw man' or agent to obtain a firearm from a licensed dealer, the statutory scheme would be too easily defeated." *United States v. Nelson*, 221 F.3d 1206, 1209 (11th Cir. 2000).

Thus, in an effort to effectuate what these courts perceived as the congressional intent of the Gun Control Act, they created the straw purchaser legal fiction, which treats the ultimate recipient of a gun as the "actual buyer" and the initial buyer as a mere "straw man." As the Ninth Circuit has explained, this legal fiction uses a common law agency principle to criminalize straw purchases under the laws governing false statements to gun dealers:

> In effect, this doctrine is merely an application of a principle that dates back to the time when the legal profession relied regularly on maxims expressed in Latin to illuminate the law: "Qui facit per alium facit per se," or "He who acts through another acts himself." In this context, it is a construction of the statute that directly serves the primary purpose of the Gun Control Act, which is "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."

United States v. Moore, 109 F.3d 1456, 1461 (9th Cir. 1997) (en banc) (quoting *Barrett*, 423 U.S. at 220)). Thus, "[t]he straw man doctrine, which is nothing more than a long-standing construction of the relevant statutes, holds that a person violates section 922(a)(6) by acting as an intermediary or agent of someone who is ineligible to obtain a firearm from a licensed dealer and making a false statement that enables the ineligible principal to obtain a firearm." *Id.* at 1460-61.

When the courts first created the straw purchaser doctrine, they described it as applying only in circumstances where the ultimate recipient of the gun was a prohibited person. *See Perri v. Dep't of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981); *see also United States v. Ortiz-Loya*, 777 F.2d 973, 978 (5th Cir. 1985). As one federal district court held, after discussing the historical application of the doctrine, "[a]ny reasonable jury would be compelled to conclude that none of the firearm purchases disclosed by the evidence fall into the definition of a straw purchase. This is so because all the alleged 'straw purchasers,' as well as the alleged actual purchasers, were eligible to purchase firearms." *United States v. Dollar*, 25 F. Supp. 2d 1320, 1324-25 (N.D. Ala. 1998).

The government also initially viewed the court-created straw purchaser doctrine as limited to transactions involving those ineligible to buy guns themselves. For example, a 1979 ATF circular with the heading "CLARIFICATION OF 'STRAW MAN TRANSACTIONS'" states that "[t]he Gun Control Act of 1968 does not necessarily prohibit a dealer from making a sale to a person who is actually purchasing the firearm for another person. It makes no difference that the dealer

knows that the purchaser will later transfer the firearm to another person, so long as the ultimate recipient is not prohibited from receiving or possessing a firearm." Industry Circular No. 79-10, Dep't of the Treas., Bureau of Alcohol, Tobacco and Firearms (Aug. 7, 1979).

Likewise, ATF Form 4473, which is the form that gun applicants must complete when buying a gun from a federally licensed firearm dealer, stated for years "that a 'straw purchase' may violate federal firearms laws if the licensee knows and has reasonable cause to believe that the true purchaser of the firearm(s) *is 'ineligible' to make that purchase directly.*" *United States v. Polk*, 118 F.3d 286, 295 n.7 (5th Cir. 1997) (describing 1991 version of Form 4473) (emphasis added).

In 1986, Congress finally closed the "loophole" that gave rise to the straw purchaser doctrine. *See* Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449, § 1(b) (1986). In the Firearms Owners' Protection Act, Congress amended 18 U.S.C. § 922(d), which had previously barred only licensed gun dealers from selling guns to prohibited persons, and expanded it to prohibit *anyone* from selling guns to prohibited persons. *Id.*

The legislative history of this provision indicates that it was enacted because "[t]here has been substantial concern since 1968 that the Gun Control Act had serious omissions that limited its ability to keep firearms out of the hands of criminals." H.R. Rep. No. 99-495, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1329. "The bill makes it unlawful for any person, not only licensees, to sell or otherwise dispose of firearms to certain prohibited

categories of persons, e.g., a convicted felon." *Id.* at 17, 1986 U.S.C.C.A.N. at 1343. As a result, the amendment "close[d] an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons." *Id.*

Although the Firearms Owners' Protection Act of 1986 eliminated the "loophole" upon which the lower federal courts relied to create the straw purchaser doctrine, those courts did not abandon the doctrine after the Act took effect. To the contrary, some circuits expanded the straw purchaser doctrine, holding that it also applies in circumstances where a person buys a gun intending to resell it to another *lawful* purchaser. The expanded straw purchaser doctrine thus criminalizes conduct that Congress chose not to prohibit in its 1986 amendments to the Gun Control Act.

This expansion of the straw purchaser doctrine began in the mid-1990s when ATF changed the wording of Form 4473 and the Federal Firearms Regulations Reference Guide by "redefining the term 'straw purchase' to include eligible purchasers." *Dollar*, 25 F. Supp. 2d at 1324; *see also Polk*, 118 F.3d at 295 n.7. Neither change was subject to any public notice and comment period or other administrative rulemaking procedure. Instead, ATF simply changed the wording of the "actual buyer" question on ATF Form 4473 and then released the new form to the public. *Dollar*, 25 F. Supp. 2d at 1325 n.6; *see also Polk*, 118 F.3d at 295 n.7.

That version of Form 4473, which is still in use today, addresses the straw purchaser doctrine in Question 11.a:

> Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.**

SA-1; *see also* ATF Form 4473, Question 11.a, *available at www.atf.gov/files/forms/download/atf-f-4473-1.pdf*. The instructions at the end of Form 4473 contain additional guidance for answering Question 11.a, including the following example:

> **ACTUAL TRANSFEREE/BUYER EXAMPLES**: Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer **"NO"** to question 11.a.

SA-4.

After ATF revised its forms to expand the straw purchaser doctrine, at least three circuits likewise held that the straw purchaser legal fiction applies even in circumstances where the buyer purchases the firearm for another lawful buyer. *See United States v. Morales*, 687 F.3d 697, 701 (6th Cir. 2012); *United States v. Frazier*, 605 F.3d 1271, 1280 (11th Cir. 2010); Pet. App. 1a-24a. Two other circuits have rejected this reasoning. *See Moore*, 109 F.3d at 1460-61; *Polk*, 118 F.3d at 295.

III. PETITIONER'S PROSECUTION FOR VIOLATING §§ 922(a)(6) and 924(a)(1)(A).

In the fall of 2009, Petitioner Bruce Abramski's elderly uncle decided he wanted a gun to protect himself inside his home. He went to petitioner for advice because petitioner was a former police officer and had experience with firearms. Petitioner told his uncle that he could obtain a law enforcement discount at gun stores and offered to buy the gun for his uncle to save him some money. Pet. App. 3a; JA 26a, 28a.

Petitioner's uncle wanted to ensure that they "do things by the book," so he spoke to three different licensed gun dealers to ensure that petitioner could buy the gun for him and legally transfer it to him at another gun dealer near his home. JA 27a-28a, 31a. All three gun dealers confirmed that petitioner lawfully could purchase the gun for his uncle in Virginia and then transfer title to his uncle through a licensed gun dealer in Pennsylvania. Pet. App. 3a; JA 28a, 31a.

After determining that the gun transfer would be legal, petitioner's uncle sent him a check to cover the cost of the gun. Petitioner then went to a local gun store and bought the gun. As part of the necessary paperwork and background check, petitioner filled out ATF Form 4473, discussed *supra* at 8-10. Petitioner checked the "Yes" box in response to question 11.a, indicating that he was the actual buyer. SA-1.

After buying the gun, petitioner traveled to his uncle's hometown and met him at a nearby gun store. Petitioner and his uncle filled out all the necessary federal

paperwork to resell the gun to his uncle. His uncle passed the required background check and petitioner and his uncle paid all the necessary transfer fees. At a hearing in the district court, an ATF agent testified under oath that petitioner's transfer of the gun to his uncle was lawful:

> Q. Okay. So we're in agreement that the transfer to Mr. Alvarez was legal?
>
> A. Yes, sir.

JA 9a.

Nevertheless, after discovering that petitioner's uncle wrote a check for the gun *before* petitioner bought it, the government indicted petitioner in the District Court for the Western District of Virginia for violating 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A). The government contended that petitioner made a false statement about the identity of the "actual buyer" of the gun. JA 17a-18a.

Petitioner moved to dismiss the indictment on the ground that neither § 922(a)(6) nor § 924(a)(1)(A) apply to petitioner's allegedly false statement on Question 11.a because both petitioner and his uncle were lawful gun purchasers. Pet. App. 8a; JA 12a-13a. Thus, petitioner argued that his answer to Question 11.a was not "material to the lawfulness of the sale" under § 922(a)(6) and was not "information required by this chapter to be kept" under § 924(a)(1)(A). The district court denied the motion in an oral ruling. Pet. App. 26a.

Petitioner later entered a conditional guilty plea, reserving his right to appeal on the issue of whether §§

922(a)(6) and 924(a)(1)(A) apply when a person fails to disclose the intent to resell a firearm to another lawful purchaser in the future. Pet. App. 10a. Petitioner then timely appealed on that issue. Pet. App. 10a; JA 4a.

The Court of Appeals for the Fourth Circuit rejected petitioner's arguments and affirmed. First, the court rejected petitioner's argument that his answer to Question 11.a was not "material to the lawfulness of the sale." The court held that the straw purchaser doctrine applies even where one lawful purchaser buys a gun for another lawful purchaser, rejecting the contrary holding of the Fifth Circuit in *Polk*. Pet. App. 15a. The court adopted the reasoning of the Eleventh Circuit, holding that:

> [T]o say that the identity of the actual purchaser is material to the lawfulness of one sale but not to another, is counterintuitive. . . . [W]e focus on whether one's identity is a fact that is material to the lawfulness of a sale. *The identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under § 922(a)(6).* Thus, it can be reasoned that although the lawfulness of a sale may change depending on the identity of the purchaser, the fact that the identity of the purchaser is material to the lawfulness of the sale does not.

Pet. App. 15a-16a (quoting *Frazier*, 605 F.3d at 1280). The court concluded by holding that "[b]ecause the identity of the actual purchaser of the handgun was material to the lawfulness of its acquisition by petitioner on November 17, 2009, he made a false and fictitious statement to the licensed dealer when he answered 'Yes' to question 11.a

on ATF Form 4473, assuring the dealer that he was the actual buyer." Pet. App. 17a.

The court also rejected petitioner's argument concerning § 924(a)(1)(A), holding that "the identity of the actual purchaser of the Glock 19 handgun was a fact required to be maintained by the Virginia firearms dealer that sold the firearm." Pet. App. 18a.

SUMMARY OF ARGUMENT

1. Petitioner's statement that he was the "actual buyer" of the gun was not "material to the lawfulness of the sale" under § 922(a)(6). A false statement "is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988). This is a case-specific analysis that asks whether the misrepresentation was capable of affecting the outcome of the governmental decision at issue.

Here, the law permits petitioner to buy a gun with the intent to resell it to another lawful buyer such as his uncle—*i.e.*, it permits him to engage in a "straw purchase" with a lawful buyer. Thus, applying the case-specific materiality analysis outlined in *Kungys*, petitioner's false statement was not material to the *lawfulness* of the sale because the gun dealer lawfully could have sold petitioner the gun even if petitioner had disclosed his intent to resell it to his uncle.

2. Even if the Court departs from its case-specific materiality analysis applied in *Kungys*, petitioner's false

statement was not material because the court-created straw purchaser doctrine cannot apply here. That legal fiction, which this Court has not previously addressed or endorsed, is an impermissible judicial expansion of the plain text of a criminal statute. The lower courts created the straw purchaser doctrine to close a perceived "loophole" in the plain text of the original Gun Control Act that permitted gun buyers to readily acquire guns on behalf of those not lawfully entitled to possess them. But it is well-settled that the sole function of the courts is to enforce criminal laws as written, not to rewrite them to better achieve the courts' perception of the law's goals. Moreover, Congress later expressly closed the "loophole" that was the genesis of the straw purchaser doctrine, but did so through means other than criminalizing the purchase of a gun with the intent to resell it to another buyer. Nevertheless, the lower courts continue to apply the straw purchaser doctrine despite no present justification for doing so.

Moreover, whatever the merits of the straw purchaser doctrine generally, it certainly cannot apply where a gun buyer purchases a firearm for another lawful buyer. In that circumstance, the underlying rationale for the doctrine—preventing guns from falling into the hands of those not legally entitled to possess them—does not apply. Because this Court narrowly construes any judicial expansion of a criminal law, it should reject application of the straw purchaser doctrine in circumstances involving lawful gun buyers.

If the Court rejects the straw purchaser doctrine, it should reverse the court of appeals. The definition of "actual buyer" on the ATF form conforms to the

meaning of that term under the straw purchaser doctrine. That special meaning of "actual buyer" is not found in the Gun Control Act or its accompanying regulations. Indeed, without the straw purchaser rule, the person who completes the ATF form, undergoes the background check, and physically takes possession of the gun is the "actual buyer" under the law. Accordingly, without the straw purchaser rule, petitioner's answer to the "actual buyer" question, even if false based on the definition in the form, was not material to the *lawfulness* of the sale because it was consistent with the Gun Control Act and its regulations.

3. Petitioner's answer to the "actual buyer" question also was not a false statement concerning information "required by this chapter to be kept" in a gun dealer's records under § 924(a)(1)(A). The chapter of the U.S. Code containing the Gun Control Act only requires that a licensed dealer keep three specific pieces of information about gun buyers—name, age, and place of residence. Even if the Court construes the phrase "required *by this chapter* to be kept" to include ATF regulations promulgated under the Gun Control Act, those regulations similarly do not require gun dealers to record information about the ultimate recipient or "actual buyer" of the firearm. In any event, the government's theory again depends on the straw purchaser doctrine and, for the reasons explained above, that doctrine cannot apply on the facts of this case.

Accordingly, the Court should reverse the court of appeals and remand for dismissal of the indictment.

ARGUMENT

I. PETITIONER DID NOT MAKE A FALSE STATEMENT "MATERIAL TO THE LAWFULNESS OF THE SALE" UNDER § 922(a)(6).

A. Petitioner's false statement was not "material to the lawfulness of the sale" even if the Court applies the straw purchaser doctrine.

Title 18 U.S.C. § 922(a)(6) criminalizes false statements to gun dealers that are "material to the lawfulness of the sale" of the firearm. The government indicted petitioner under § 922(a)(6) based on his answer to Question 11.a on ATF Form 4473, where petitioner indicated that he was the "actual buyer" of the gun. JA 17a-18a. The government contends that petitioner was required to disclose his intent to resell the gun to his uncle, and that his failure to do so was a false statement "material to the lawfulness of the sale" under § 922(a)(6).

But as explained below, no matter what answer petitioner gave to that question, the dealer still could have lawfully sold petitioner the gun. Thus, under well-settled materiality precedent from this Court, petitioner's answer to the actual buyer question was not "material to the lawfulness of the sale."

The legal meaning of the term "material" in criminal statutes is controlled by this Court's decision in *Kungys v. United States*, 485 U.S. 759 (1988). In *Kungys*, the Court held that a false statement "is material if it 'has a natural tendency to influence, or was capable of influencing, the

decision of" the decisionmaking body to which it was addressed." *Id.* at 770. Notably, although the Court has restated the *Kungys* standard in several other cases, *Kungys* is the only case in which this Court actually analyzed and applied that test.

Juozas Kungys was a native Lithuanian who was naturalized as a U.S. citizen in the 1950s. In 1982, the U.S. government sought to denaturalize Kungys because of his alleged participation in the execution of 2,000 Lithuanians, most of them Jewish, during World War II. *Id.* at 764. The government argued that Kungys had falsely stated his date of birth and place of birth in his naturalization paperwork in an effort to conceal his involvement in these atrocities. *Id.* at 764-65.

Federal law permits the government to denaturalize a U.S. citizen whose naturalization was "procured by concealment of a material fact." *Id.* at 767. Kungys conceded that he "willfully misrepresented the date and place of his birth in his naturalization proceeding in 1954" but argued that those misrepresentations were not "material." *Id.*

This Court adopted the "natural tendency to influence" or "capable of influencing" test, explaining that this materiality analysis turns on whether the false statement was capable of influencing the decision *in that particular case*:

> We think it safer in the naturalization context, as elsewhere, to fix as our guide the central object of the inquiry: whether the misrepresentation or concealment was predictably capable of

> affecting, i.e., had a natural tendency to affect, the official decision. The official decision in question, of course, is whether *the applicant* meets the requirements for citizenship, so that the test more specifically is whether the misrepresentation or concealment had a natural tendency *to produce the conclusion that the applicant was qualified.*

Id. at 771-72 (emphasis added).

The Court's application of the materiality test in *Kungys* leaves no doubt that it is case-specific. Although the Court's announcement of the standard for materiality was a majority holding authored by Justice Scalia, the application of that standard in *Kungys* did not produce a majority opinion. *Id.* at 762-63. However, both Justice Scalia's opinion (joined by Chief Justice Rehnquist and Justice Brennan) and Justice Stevens' opinion concurring in the judgment (joined by Justice Marshall and Justice Blackmun) applied a case-specific, contextual test to conclude that Kungys' false statement was not material.

Justice Scalia concluded that Kungys' misrepresentation of his date and place of birth was not material because "[t]here has been no suggestion that those facts were themselves relevant to his qualifications for citizenship." *Id.* at 774. In other words, Justice Scalia's opinion concluded that Kungys' false statements were not material because the result of the naturalization decision would have been the same even if Kungys had provided his true date and place of birth. Justice Scalia also considered whether providing the truthful information "would predictably have disclosed other facts relevant to

his qualifications" but again concluded that "not even that has been found here." *Id.* Thus, the opinion concluded that Kungys' citizenship was not "procured by concealment of a material fact." *Id.* at 773-74.

Justice Stevens, concurring in the judgment, also concluded that Kungys' false statements were not material. Justice Stevens noted that "the Government failed to prove the existence of any fact that, if known, would have . . . disqualified [Kungys] from later becoming an American citizen." *Id.* at 785. Justice Stevens further explained that, to be material, the "misrepresentation must have had the effect of allowing the person to obtain citizenship when a truthful statement would have led directly or after investigation to the denial of citizenship." *Id.* at 788.

Even Justice White's dissenting opinion indicates that the materiality analysis is contextual—meaning that it must focus on whether the false statement affected the official decision *in that case*, not whether, hypothetically, that type of false statement could affect the outcome of that type of decision. *See id.* at 809-10 (White, J., dissenting).

Commentators acknowledge that this Court's decision in *Kungys* requires a case-specific, contextual analysis. *See* Steven R. Morrison, *When Is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. Marshall L. Rev. 111, 120 (2009) ("[T]he *Kungys* definition of materiality indicates a subjective approach, asking whether the actual statement made was capable of influencing the actual government decisionmaker involved."); Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*,

54 Wm. & Mary L. Rev. 83, 105 (2012-2013) ("[M]ateriality cannot be evaluated in the abstract. . . . Courts and schools agree that this renders the materiality threshold heavily context- and fact-dependent."). Moreover, this contextual approach is sound policy. The historical purpose of materiality provisions in criminal statutes is to avoid imposing harsh criminal punishments on individuals whose statements, while false, turned out to be unimportant or trivial—that is, the false statement was not capable of affecting the outcome. *See* 2 William Blackstone, *Commentaries* *137 (a false statement under oath "must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance" it is not punishable); *United States v. Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975).

Finally, even if this Court is not inclined to follow *Kungys*' contextual approach to materiality as a general principle, the statutory language of § 922(a)(6) requires that the contextual approach be applied here. Section 922(a)(6) criminalizes false statements "material to the lawfulness of *the sale*." In other words, the statute applies only if the false statement had "a natural tendency to influence, or was capable of influencing" the determination of whether the firearm sale *in this case* (*i.e.*, "the sale") was lawful. That determination requires a case-specific approach.

Applying this case-specific, contextual materiality analysis, the court of appeals erred by holding that the identity of the actual purchaser "*always*" is material to the lawfulness of the sale. Pet. App. 15a-16a. Here, the law permits petitioner to buy a gun for his uncle. As explained above, there is no statute or regulation that

prohibits a gun dealer from selling a firearm to someone who intends to resell it to another lawful buyer (*i.e.*, someone who, under the straw purchaser fiction, is not the "actual buyer"). Indeed, the statutes and accompanying regulations provide several lawful means for people to buy guns intending to resell them to other lawful buyers. For example, one can buy a gun and immediately resell it lawfully to another resident of that state without any federal paperwork or background checks at all (provided the recipient is not a prohibited person). *See* 18 U.S.C. §§ 922(a)(3), (a)(5), (d); 27 C.F.R. §§ 478.29, 478.30; *see also* ATF Reference Guide, *supra*, at 176. Likewise, that same gun buyer lawfully can resell the gun to an out-of-state resident by traveling to the recipient's home state and transferring the gun through a licensed gun dealer in that state, as petitioner did in this case. *See* 18 U.S.C. §§ 922(a)(3), (b)(3); *see also* ATF Reference Guide, *supra*, at 177.[2]

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2. ATF's Reference Guide states:

> (B)(3) May an unlicensed person obtain a firearm from an out-of-State source if the person arranges to obtain the firearm through a licensed dealer in the purchaser's own State?
>
> A person not licensed under the [Gun Control Act] and not prohibited from acquiring firearms may purchase a firearm from an out-of-State source and obtain the firearm if an arrangement is made with a licensed dealer in the purchaser's State of residence for the purchaser to obtain the firearm from the dealer.
>
> [18 U.S.C. 922(a)(3) and 922(b)(3)]

ATF Reference Guide, *supra*, at 177.

To be sure, Question 11.a on ATF Form 4473 states that "If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." SA-1. But that statement is simply not the law. There is no corresponding statute or regulation that imposes this restriction on gun dealers, nor was this statement on Form 4473 ever subject to the administrative requirements necessary to give it the power of law. *See* 18 U.S.C. § 926(b); *United States v. Am. Invest. of Pittsburgh, Inc.*, 879 F.2d 1087, 1091 n.4 (3d Cir. 1989). Thus, while that statement may, as a practical matter, discourage some gun dealers from selling guns to individuals who answer "No" to Question 11.a, it has no bearing on the "lawfulness" of the sale. The lawfulness of the sale is governed by the applicable statutes and regulations, and no statute or regulation prohibits a gun dealer from selling a gun to someone who, like petitioner, intends to resell the gun to another lawful purchaser in the future.

In sum, because the gun dealer lawfully could have sold the gun to petitioner regardless of his answer to Question 11.a, petitioner's allegedly false statement on Question 11.a was not "material to the lawfulness of the sale." Accordingly, this Court should reverse and remand this case for dismissal of count I of the indictment.

B. The straw purchaser doctrine cannot apply in this case.

Even if the Court abandons the contextual materiality analysis established in *Kungys*, it should reverse the court of appeals. The court of appeals' materiality ruling—which held that petitioner had concealed the "actual purchaser" of the firearm—depends on application of the

court-created straw purchaser doctrine. As explained below, that legal fiction is an impermissible judicially created expansion of the unambiguous text of § 922(a)(6) which this Court should disapprove. At a minimum, the doctrine cannot apply in a case like this one, where the buyer purchases the gun with the intent to resell it to another *lawful* purchaser.

If this Court rejects application of the straw purchaser doctrine—either in all cases or solely for sales to other lawful buyers—it should reverse the court of appeals' materiality determination. Without the straw purchaser doctrine, petitioner's answer to Question 11.a on ATF Form 4473 was not "material to the lawfulness of the sale" because, regardless of what the form says, petitioner was the actual buyer of the gun.

1. The straw purchaser doctrine is an impermissible judicial expansion of a criminal statute.

This Court has never considered, much less endorsed, the straw purchaser doctrine created by the lower courts. As explained below, that doctrine should be rejected because it improperly expands an unambiguous criminal statute. Moreover, the doctrine is no longer necessary (if it ever was) because Congress closed the loophole that gave rise to the doctrine in the first place.

As an initial matter, the straw purchaser doctrine is an impermissible expansion of the plain text of the Gun Control Act. When a statute's language is plain, the sole function of the courts is to enforce the statute according to its terms. *Dodd v. United States*, 545 U.S. 353, 359

(2005); *see also Carr v. United States*, 560 U.S. 438, 456 (2010). Indeed, "Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted).

The straw purchaser doctrine is not mentioned anywhere in the Gun Control Act. To the contrary, the statutes and accompanying regulations actually provide several lawful means for individuals to buy guns with the intent to resell them to other lawful purchasers. *See supra* at 22. But despite the plain text of these statutes, the lower courts created the straw purchaser doctrine to plug a perceived loophole in the law. *See supra* at 6-7. As one court explained, "[i]f an ineligible buyer could simply use a 'straw man' or agent to obtain a firearm from a licensed dealer, the statutory scheme would be too easily defeated." *Nelson*, 221 F.3d at 1209.

Federal courts do not have the power to create new criminal law or expand existing criminal laws to reach new conduct. "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). Indeed, to ensure the legislature retains this exclusive power, this Court repeatedly has held that there can be no federal criminal common law. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

By creating the "straw purchaser" doctrine, the lower courts overstepped their power and judicially created new criminal law. The plain text of § 922(a)(6) and its sister provisions in the Gun Control Act do not prohibit straw

purchases—a fact Congress has long understood. *See supra* at 4-6. Indeed, as discussed in more detail *infra* at 27, Congress ultimately closed the statutory "loophole" on which the courts relied to create the straw purchaser doctrine, but did so through means that did not prohibit buyers from purchasing guns on behalf of other lawful buyers. The straw purchaser doctrine thus criminalizes activity that Congress *intentionally* did not prohibit in § 922(a)(6) or elsewhere in the law. As a result, the lower courts' creation and continued use of the straw purchaser doctrine impermissibly amends § 922(a)(6) and deprives Congress of its exclusive authority to create criminal laws. *See generally* 1 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 3:27 (7th ed. 2007).

To be sure, some courts have claimed that the straw purchaser doctrine stems from a "construction of the relevant statutes." *See, e.g., Moore*, 109 F.3d at 1460-61. But there is no ambiguous statutory language in § 922(a)(6) that could be interpreted to include straw purchases. Rather, the lower courts rely solely on a purported purpose of the Gun Control Act—keeping guns out of the hands of criminals—to justify the doctrine. *See, e.g., Nelson*, 221 F.3d at 1209. "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160 (1990). This Court should remain faithful to the language chosen by Congress in the Gun Control Act—and the specific means chosen by Congress to achieve its legislative objectives—and reject the expansion of the Act's plain text through a court-created legal doctrine.[3]

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3. Even the government has been unable to consistently apply this court-created doctrine. For example, the government permits

In addition, even if the straw purchaser doctrine were permissible (and it is not), it is unnecessary. The lower courts created the straw purchaser doctrine because the Gun Control Act initially failed to prohibit an individual from buying a gun and then transferring it to a prohibited person. *See supra* at 6-7. As a result, the government purportedly lacked any means to deter "a 'straw man' or agent" from buying guns and reselling them to prohibited persons. *Id.*

Congress was aware of this purported gap in the law. *See supra* at 4-6. Ultimately, in 1986, Congress broadened § 922(d) to bar individuals from transferring guns to prohibited persons. This expansion of § 922(d) was intended to prohibit illegal straw purchases. *See* H.R. Rep. No. 99-495, at 17 (1986) *reprinted in* 1986 U.S.C.C.A.N. 1327, 1343 (stating that the amendment "closes an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons"); *United States v. Jefferson*, 334 F.3d 670, 675 (7th Cir. 2003). Indeed, the government now uses § 922(d) to prosecute straw purchasers. *See, e.g., United States v. Manis*, 344 F. App'x 160, 166 (6th Cir. 2009) (upholding a conviction under § 922(d) for "unlawful straw purchases with a prohibited person").

Furthermore, § 922(d) is hardly the only statutory tool available to the government to prosecute those who buy guns for prohibited persons. For instance, the

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a person to buy a gun for another lawful buyer if it is intended as a gift. SA-4. But the lower courts' rationale for the straw purchaser doctrine applies equally regardless of whether the ultimate recipient pays for the gun or receives it as a gift.

government may prosecute a straw purchaser under the aiding and abetting statute, 18 U.S.C. § 2(a), which "applies with full force to one who furnishes a firearm to a person prohibited . . . from receiving it." *United States v. Falletta*, 523 F.2d 1198, 1201 (5th Cir. 1975); *see also United States v. Samuels*, 521 F.3d 804, 812 (7th Cir. 2008) (holding a defendant aids and abets a felon in possession of a firearm when the defendant assists the felon in possession of the firearm and has knowledge that individual is a felon). The government may also prosecute straw purchasers under the conspiracy statute, 18 U.S.C. § 371. *See, e.g., United States v. Santiesteban*, 825 F.2d 779, 782 (4th Cir. 1987) (upholding a conviction for conspiracy for transporting a firearm to a prohibited person).

In sum, because Congress closed the perceived loophole that was the genesis of the straw purchaser doctrine, there is no longer any justification for it. Whatever the merits of the straw purchaser doctrine when the loophole existed, it is certainly impermissible to continue applying it after Congress amended the statute to remove the loophole that animated the doctrine in the first place.

2. The straw purchaser doctrine does not apply when the ultimate recipient is a lawful gun buyer.

Even if this Court believes the straw purchaser doctrine is valid as a general principle, the Court should hold that it does not apply in a case like this one, where an individual purchases a gun on behalf of another *lawful* purchaser.

This Court construes criminal statutes narrowly and disfavors expanding criminal laws beyond their plain text. *See Dowling v. United States*, 473 U.S. 207, 213-14 (1985) (noting courts generally "find a 'narrow interpretation' appropriate" when "assessing the reach of a federal criminal statute"). This is especially true in instances where the statute does not clearly criminalize the conduct at issue. *See Williams v. United States*, 458 U.S. 279, 286 (1982) ("[W]hen interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings.'"); *United States v. Alpers*, 338 U.S. 680, 685-86 (1950) (noting courts should be wary of interpreting criminal statutes "to include conduct that Congress might have barred, but did not, by the language it used"). This principle should apply with even greater force to a court-created doctrine that itself expands the plain text of the statute.

Here, the lower courts created the straw purchaser doctrine in order to plug a perceived loophole that readily permitted individuals to obtain guns for prohibited persons without violating the law. *See supra* at 6-7. The doctrine was necessary, according to these courts, to vindicate a key goal of the Gun Control Act—keeping guns out of the hands of those not legally entitled to possess them. *See Nelson*, 221 F.3d at 1209.

But when the ultimate recipient of a gun is legally entitled to buy and own guns, that concern is not even implicated. Thus, construing the straw purchaser doctrine narrowly—as this Court's precedent requires, *see Williams*, 458 U.S. at 286—the doctrine cannot apply to the facts of this case, where a lawful gun buyer

purchased a firearm with the intent to resell it to another lawful buyer.

C. Because the straw purchaser doctrine does not apply, petitioner was the actual buyer of the firearm and his statement on Form 4473 was not "material to the lawfulness of the sale."

Without the straw purchaser doctrine, petitioner's answer to Question 11.a was not "material to the lawfulness of the sale" under either a contextual or categorical approach to materiality.

The government's theory in this case is that, although petitioner stood at the counter and bought the gun himself, he was not the "actual buyer" of the firearm. This theory relies on the straw purchaser legal fiction, which transforms the person standing at the gun counter into a mere conduit for some ultimate recipient who, as a legal matter, is treated as the true buyer. The government argued—and the court of appeals agreed—that the identity of that ultimate recipient or "actual buyer" is a fact material to the lawfulness of the sale. Pet. App. 15a-17a.

Question 11.a is designed to obtain the information necessary to determine if the straw purchaser legal fiction applies. It asks whether the person completing the form is the "actual buyer" and explains in bold print that "You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person." SA-1. Importantly, Question 11.a standing alone has no legal power. To be sure, it defines the term "actual buyer" to exclude anyone buying a gun "on behalf of another person." SA-1. But the Gun Control Act and its accompanying regulations do not use

the term "actual buyer" at all. That term, along with the corresponding notion that a gun buyer who intends to resell the gun is not the "actual buyer," stem solely from the court-created doctrine. *See supra* at 6-7, 9-10; *see also Am. Invest. of Pitisburgh*, 879 F.2d at 1091 n.4 ("[T]he form provides an interpretation of activity . . . otherwise lacking in the statute and regulations. . . . Since utilization of this definition could be construed to impose new duties on financial institutions, courts have refused to treat the form as an agency rulemaking establishing a basis for liability because the form was not promulgated in accordance with the safeguards provided by the Administrative Procedure Act.").

Thus, the straw purchaser doctrine is the sole reason petitioner's answer to Question 11.a is material to the *lawfulness* of the sale. To be sure, petitioner's answer to Question 11.a may have been false based on the definition of "actual buyer" in the form itself. But the form's definition of "actual buyer" is not the statute's or regulations' definition of actual buyer. *See id.* Without the straw purchaser rule, petitioner *was* the actual buyer under the Gun Control Act and its accompanying regulations—regardless of his intent to resell the gun to someone else—because he was the person who filled out the form, underwent a background check, paid for the gun, and physically took possession of it. Accordingly, if this Court rejects application of the straw purchaser doctrine, petitioner's false statement that he was the "actual buyer," as that term is uniquely defined in Question 11.a, was not material to the *lawfulness* of the sale because, as a legal matter under the Gun Control Act and its regulations, he *was* the actual buyer regardless of which box he checked on Question 11.a.

II. PETITIONER'S INTENT TO RESELL THE GUN TO HIS UNCLE IS NOT INFORMATION "REQUIRED BY THIS CHAPTER TO BE KEPT."

The Gun Control Act also imposes certain record-keeping requirements on gun dealers who sell firearms. *See* 18 U.S.C. §§ 922(b)(5) and 923(g)(1)(A). In addition to criminalizing false statements to gun dealers that are "material to the lawfulness of the sale," Congress also criminalized false statements "with respect to the information required by this chapter to be kept in the records of a [licensed gun dealer]." 18 U.S.C. § 924(a)(1)(A).

Count II of the indictment charged petitioner with violating § 924(a)(1)(A). The government alleged that petitioner's answer to Question 11.a, which asked whether petitioner was the "actual buyer" of the firearm, was "information required by this chapter to be kept" in a gun dealer's records. JA 18a. The court of appeals agreed, holding that "the identity of the actual purchaser of the Glock 19 handgun was a fact required to be maintained by the Virginia firearms dealer that sold the firearm." Pet. App. 18a.

This is wrong. As explained below, Chapter 44 of Title 18 of the United States Code (the chapter containing the Gun Control Act) only requires that a licensed dealer keep three specific pieces of information about gun buyers—name, age, and place of residence. Even if the Court construes the phrase "required *by this chapter* to be kept" to include ATF regulations promulgated under the Gun Control Act, those regulations also do not require gun dealers to record the information contained in Question 11.a. Finally, the government cannot argue that petitioner

made a false statement about the name of the "transferee" in Question 1 (which, admittedly, is information required to be kept) because the indictment only alleges a false statement in Question 11.a. In any event, that argument depends on the straw purchaser doctrine, which the Court should reject for the reasons discussed above.

A. The answer to Question 11.a on Form 4473 is not information required to be kept by Chapter 44.

The court of appeals erred by holding that "the identity of the actual purchaser of the Glock 19 handgun was a fact required to be maintained by the Virginia firearms dealer" under § 924(a)(1)(A). Pet. App. 18a. There are only two provisions of the Gun Control Act that reference the information that must be kept by licensed gun dealers: 18 U.S.C. § 922(b)(5) and § 923(g)(1)(A). Section 922(b)(5) requires that "the licensee note[] in his records, required to be kept pursuant to section 923 of this chapter, the *name*, *age*, and *place of residence*" of a gun purchaser. *Id.* (emphasis added). Section 923(g)(1)(A) requires that "[e]ach licensed importer, licensed manufacturer, and licensed dealer shall maintain such records of . . . sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe." 18 U.S.C. § 923(g)(1)(A).

Thus, one statute, § 922(b)(5), provides specific information that Chapter 44 itself requires gun dealers to keep in their records. The other, § 923(g)(1)(A), authorizes the Attorney General to promulgate regulations requiring additional information to be kept. This is significant because § 924(a)(1)(A) only criminalizes false statements

about information "required *by this chapter* to be kept." *Id.* (emphasis added). Thus, the Gun Control Act, by its plain terms, does not criminalize false statements about information required *by ATF regulations* to be kept. *See Williams*, 458 U.S. at 290 (this Court construes criminal statutes narrowly).

The surrounding text of the Gun Control Act confirms this conclusion. Section 924(d)(1), just a few paragraphs below § 924(a)(1)(A), permits forfeiture of a firearm if it is involved in a violation of any "provision of this chapter *or any rule or regulation promulgated thereunder.*" 18 U.S.C. § 924(d)(1) (emphasis added). This language shows that Congress ascribes different meanings to "this chapter" and "this chapter or any rule or regulation promulgated thereunder." As this Court has held, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Simply put, Congress' use of the phrase "this chapter or any rule or regulation promulgated thereunder" in § 924(d)(1) indicates that, when drafting the Gun Control Act, Congress did *not* believe the phrase "this chapter" means the regulations in addition to the statute.

Applying the plain meaning of "required *by this chapter* to be kept," § 924(a)(1)(A) criminalizes false statements concerning only the three pieces of information expressly listed in the statute itself— name, age, and place of residence. 18 U.S.C. § 922(b)(5). Notably, the intent to resell the gun to someone else, and the identity of that

ultimate recipient (*i.e.*, the "actual buyer"), are not facts required to be kept under § 922(b)(5). Thus, petitioner's false statement in Question 11.a did not involve information "required by this chapter to be kept."

Even if the Court construes the phrase "required by this chapter to be kept" to include information required to be kept by the accompanying regulations, petitioner did not make a false statement concerning that information either. Under § 923(g)(1)(A), ATF has promulgated regulations identifying the information required to be kept by gun dealers. *See* 27 C.F.R. § 478.124(a), (c). Section 478.124(a) prohibits gun dealers from selling firearms to nonlicensees "unless the licensee records the transaction on a firearms transaction record, Form 4473." Section 478.124(c) sets out the information that must be contained in Form 4473:

> Prior to making an over-the-counter transfer of a firearm to a nonlicensee who is a resident of the State in which the licensee's business premises is located, the . . . licensed dealer so transferring the firearm shall obtain a Form 4473 from the transferee showing the transferee's *name*, *sex*, *residence address* (including county or similar political subdivision), *date and place of birth*; *height*, *weight* and *race* of the transferee; the transferee's *country of citizenship*; the transferee's *INS-issued alien number or admission number*; the transferee's *State of residence*; and *certification by the transferee that the transferee is not prohibited by the Act* from transporting or shipping a firearm in interstate or foreign commerce or receiving a

> firearm which has been shipped or transported in interstate or foreign commerce or possessing a firearm in or affecting commerce.

27 C.F.R. § 478.124(c)(1) (emphasis added).

Again, as with the statute itself, the regulations do not require a gun dealer to keep a record of whether the gun buyer intends to resell the gun—*i.e.*, whether he is the "actual buyer" as that term is defined in Question 11.a on Form 4473. As a result, even if the Court interprets § 924(a)(1)(A) to apply both to the information required to be kept in Chapter 44 itself and to the additional information required by ATF regulations, petitioner did not violate § 924(a)(1)(A). His only allegedly false statement was on Question 11.a of the Form and that question does not request information "required by this chapter to be kept" in a gun dealer's records. 18 U.S.C. § 924(a)(1)(A).

B. The straw purchaser doctrine cannot be used to expand the scope of § 924(a)(1)(A).

The government may argue that the Court should apply the straw purchaser doctrine and conclude that petitioner made a false statement about the name of the "transferee" in Question 1 of Form 4473. Admittedly, the name of the transferee is a piece of information required to be kept both by the Gun Control Act itself and by the accompanying regulations. *See* 18 U.S.C. § 922(b)(5); 27 C.F.R. § 478.124(c).

But the government did not indict petitioner for making a false statement about the name of the transferee.

The indictment states that petitioner "represented that he was the actual buyer of the firearm, when in fact . . . he was buying the firearm for another individual." JA 18a. On appeal, the government cannot expand its theory of the case beyond the charges actually made in the indictment. *See Stirone v. United States*, 361 U.S. 212, 216 (1960). Here, petitioner's statement "that he was the actual buyer of the firearm," as alleged in the indictment, is found solely in Question 11.a of the form. As explained above, the answer to that question is not information "required by this chapter to be kept" by a licensed gun dealer.

Moreover, the term "transferee" means something different than "actual buyer," even in the context of the straw purchaser doctrine. The plain meaning of the term transferee is "one to whom title or property is transferred." *See, e.g.*, Webster's II New College Dictionary 1170 (1995).[4] In a straw purchase, the person "to whom title or property is transferred" is the straw man, not the ultimate recipient of the firearm—after all, the straw man's role in the transaction is to obtain legal title to the firearm and then resell it to the actual buyer at a later time. As a result, the government cannot rely on petitioner's answer to Question 1 to support his conviction under § 924(a)(1)(A).

Finally, even if the Court concludes that the indictment can be read to allege that petitioner falsely identified himself as the "transferee" in Question 1, that allegation depends entirely on application of the straw purchaser

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4. The term "transferee" is undefined in the Gun Control Act or its accompanying regulations and thus its ordinary meaning applies. *See Perrin v. United States*, 444 U.S. 37, 42 (1979).

doctrine. Only through that legal fiction can petitioner's uncle be considered the transferee even though petitioner was the person to whom the dealer conveyed title and physically transferred the firearm. But, for the reasons discussed in Part I.B, *supra* at 23-30, the straw purchaser doctrine does not apply to petitioner's purchase of the gun for his law-abiding uncle. Accordingly, the Court should reverse and remand for dismissal of count II of the indictment.

CONCLUSION

For the foregoing reasons, the Court should reverse the court of appeals and remand this case for dismissal of the indictment.

Respectfully submitted.

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RESPONDENT'S BRIEF

No. 12-1493

In the Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner's statement that he was the actual buyer of a firearm on a Bureau of Alcohol, Tobacco, Firearms and Explosives Form 4473 was a false statement "material to the lawfulness of the sale" under 18 U.S.C. 922(a)(6) where petitioner purchased the firearm on behalf of his uncle and both he and his uncle were eligible to purchase a firearm.

2. Whether the identity of the actual buyer of a firearm is information that is required to be kept in the records of a federal firearms licensed dealer under 18 U.S.C. 924(a)(1)(A).

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 706 F.3d 307.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2013. On April 4, 2013, the Chief Justice extended the time to file a petition for a writ of certiorari to June 21, 2013, and the petition was filed on that date. The petition for a writ of certiorari was granted on October 15, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 922(a)(6) of Title 18 of the United States Code states:

> It shall be unlawful * * * for any person in connection with the acquisition or attempted acqui-

> sition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter[.]

Section 924(a)(1)(A) of Title 18 of the United States Code states:

> (a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter * * * shall be fined under this title, imprisoned not more than five years, or both.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Western District of Virginia, petitioner was convicted on one count of making a false statement material to the lawfulness of a firearm sale, in violation of 18 U.S.C. 922(a)(6), and one count of making a false statement with respect to information required to be kept in the records of a licensed firearm dealer, in violation of 18 U.S.C. 924(a)(1)(A). He was sentenced to concurrent sen-

tences of five years of probation. The court of appeals affirmed.

1. Petitioner is a resident of Virginia and a former Roanoke police officer. Pet. App. 3a. In 2009, petitioner spoke to his uncle, Angel Alvarez, a resident of Pennsylvania, about Alvarez's desire to purchase a Glock 19 handgun. *Ibid.*; J.A. 23a-24a, 26a. Petitioner offered to purchase the gun for Alvarez from Town Police Supply, a federal firearms licensed dealer in Collinsville, Virginia that offered discounts to police officers. Pet. App. 3a; J.A. 24a. On November 15, 2009, Alvarez sent petitioner a check for $400 with "Glock 19 handgun" written in the memo line. Pet. App. 3a; J.A. 27a.

On November 17, 2009, petitioner purchased a Glock 19 handgun and other items with $2000 in cash from Town Police Supply, using his expired police identification credential to obtain the discount. Pet. App. 3a; see J.A. 30a-31a (government's observation during plea colloquy that at the time of purchase petitioner "had no relationship with the Roanoke Police force, and was not authorized to use that * * * identification card for any purpose").

During the transaction, petitioner completed a Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Form 4473, which included several questions requiring a "Yes" or "No" response. Pet. App. 3a-4a; J.A. 27a-30a; Supp. J.A. 1-6. Question 11.a. on the ATF Form 4473 asked:

> Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actu-**

> **al buyer, the dealer cannot transfer the firearm(s) to you.**

Supp. J.A. 1. The instructions for this question provided:

> **Question 11.a. Actual Transferee/Buyer:** For purposes of this form, you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself * * *. You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party. **ACTUAL TRANSFEREE/BUYER EXAMPLES:** Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer **"NO"** to question 11.a.

Id. at 4.

Petitioner checked "Yes" in response to question 11.a, thus identifying himself as the "actual buyer" of the handgun. Supp. J.A. 1. He then signed a certification stating, among other things, that he "**underst[ood] that answering 'yes' to question 11.a if [he was] not the actual buyer is a crime punishable as a felony under Federal law.**" *Id.* at 2.

Form 4473's instructions separately instructed the dealer that it "should stop the transaction if * * * the buyer answers 'no' to question 11.a" (Supp. J.A. 6) and that it "may not transfer the firearm" to an individual who answers "no" to that question (*id.* at 4). Employees of Town Police Supply were prepared to testify that "had there been any hint or indication" that petitioner "may have been purchasing the gun for

another, that the gun transaction would not or could not have gone forward, either as a matter of law or as a matter of their store's policy." J.A. 29a-30a.

On November 20, 2009, the $400 check from Alvarez was deposited in petitioner's bank account. Pet. App. 4a. The next day, petitioner transferred the firearm to Alvarez at a federally licensed firearm dealer in Easton, Pennsylvania. *Ibid.* Later, Alvarez gave petitioner a receipt confirming that Alvarez had purchased the Glock 19 handgun for $400. *Ibid.*; J.A. 27a-28a. Federal agents found and seized the receipt while executing a search warrant at petitioner's home after petitioner became a suspect in a bank robbery. Pet. App. 5a.

2. A federal grand jury in the Western District of Virginia returned a superseding indictment charging petitioner with one count of making a false statement material to the lawfulness of a firearm sale, in violation of 18 U.S.C. 922(a)(6) (making it unlawful "for any person in connection with the acquisition or attempted acquisition of any firearm * * * from a * * * licensed dealer * * * knowingly to make any false or fictitious oral or written statement * * * intended or likely to deceive such * * * dealer * * * with respect to any fact material to the lawfulness of the sale * * * under the provisions of this chapter"); and one count of making a false statement with respect to information required to be kept in the records of a licensed firearms dealer, in violation of 18 U.S.C. 924(a)(1)(A) (making it unlawful to "knowingly make[] any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed

under this chapter"). See Pet. App. 5a-7a; J.A. 17a-19a.

Petitioner filed a pretrial motion to dismiss the charges on the ground that his "Yes" response to Question 11.a on the ATF Form 4473 was not a material misrepresentation because his uncle was legally eligible to purchase a firearm. Pet. App. 8a. The district court denied the motion in an oral ruling. *Ibid.*; see *id.* at 26a.

Petitioner then filed a second motion to dismiss on the ground that the "actual buyer" information requested by Question 11.a. on ATF Form 4473 is not information that is required to be kept in the records of a federal firearms dealer and that the ATF's decision to ask for that information was made without proper notice and comment rulemaking. Pet. App. 8a-9a. In a published opinion, the district court rejected those arguments. 778 F. Supp. 2d 678 (2011). It noted that several statutory provisions "require licensed firearms dealers to keep records containing information about the identity of individuals who buy firearms." *Id.* at 680 (quoting *United States* v. *Nelson*, 221 F.3d 1206, 1209 (11th Cir.), cert. denied, 531 U.S. 951 (2000), and citing 18 U.S.C. 922(b)(5), 923(s)(3)).

The district court explained that the "information required" under those provisions "is information about the identity of the actual buyer, who supplies money and intends to possess the firearm, as opposed to that individual's 'straw man' or agent." 778 F. Supp. 2d at 681 (quoting *Nelson*, 221 F.3d at 1209). The court said that a contrary reading, under which the identity of the actual buyer behind a straw purchase were not relevant to federal record-keeping requirements, would permit "easy evasion of a com-

prehensive scheme," contrary to Congress's intent. *Ibid.* (quoting *United States* v. *White*, 451 F.2d 696, 699-700 (5th Cir. 1971), cert. denied, 405 U.S. 998 (1972)).

The district court also rejected petitioner's notice-and-comment claim. 778 F. Supp. 2d at 682. The court explained that Section 924(a)(1)(A) itself "clearly contemplates liability for * * * 'straw purchases'" and that liability for false statements about such purchases was therefore not based on "an unpublished agency interpretation of that statute." *Ibid.* (quoting *Nelson*, 221 F.3d at 1210).

Petitioner entered a conditional plea of guilty to both counts of the superseding indictment. Pet. App. 10a. The district court sentenced petitioner to five years of probation on each count, to run concurrently. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-24a. In doing so, the court noted that petitioner had appealed only the district court's denial of his first motion to dismiss. *Id.* at 9a & n.6; see Pet. C.A. Br. 3 (noting that petitioner was not challenging the alleged "administrative deficiencies" in ATF Form 4473 asserted in his second motion to dismiss).

The court of appeals rejected petitioner's argument that the "actual buyer" information required by Question 11.a. on ATF Form 4473 is only "material to the lawfulness of the sale" of a firearm, 18 U.S.C. 922(a)(6), if the person for whom the firearm is purchased is ineligible to purchase a firearm. Pet. App. 13a-17a. The court held that the "identity of the purchaser of a firearm is a constant that is always material to the lawfulness of the purchase of a firearm

under [Section] 922(a)(6)." *Id.* at 16a (quoting *United States* v. *Frazier*, 605 F.3d 1271, 1280 (11th Cir. 2010)) (emphasis omitted). Because the record established that the "sole reason" petitioner purchased the firearm was to transfer it to Alvarez, the court concluded that petitioner's statement on Form 4473 that he was the actual buyer was a false statement material to the lawfulness of the sale under Section 922(a)(6). *Ibid.*

The court of appeals also upheld petitioner's conviction under Section 924(a)(1)(A). Pet. App. 17a-18a. The court explained that the statute, which criminalizes making "any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter," 18 U.S.C. 924(a)(1)(A), "does not require that the falsehood on the ATF Form 4473 relate to the lawfulness of the firearm acquisition itself." Pet. App. 17a. "[T]he identity of the actual purchaser of the Glock 19 handgun was a fact required to be maintained by the Virginia firearms dealer that sold the firearm," so petitioner's false statement on that question violated Section 924(a)(1)(A). *Id.* at 18a.

SUMMARY OF ARGUMENT

Petitioner's knowingly false statement that he was the actual purchaser of the handgun violated both 18 U.S.C. 922(a)(6) and 924(a)(1)(A).

1. When petitioner misrepresented himself as the actual buyer of the Glock 19 handgun, he "knowingly" made a "false * * * statement * * * likely to deceive" the firearm dealer "with respect to [a] fact material to the lawfulness of the sale." 18 U.S.C. 922(a)(6). A firearm purchaser's true identity is always material because it has "a natural tendency to influence, or [is] capable of influencing" the lawfulness

of the sale. *Kungys* v. *United States*, 485 U.S. 759, 770 (1988). Federal law requires the name of a firearm purchaser to be recorded in a dealer's records, 18 U.S.C. 922(b)(5), his identity to be verified, 18 U.S.C. 922(t)(1)(C), and his background to be examined through use of federal databases, 18 U.S.C. 922(t)(1)(B). Those provisions effectuate federal law's twin objectives of keeping firearms away from ineligible individuals and allowing for the tracing of firearms involved in crimes. All of them depend on accurate identity information to achieve those goals.

Petitioner's contention that he was in fact the actual buyer of the Glock 19 handgun (because he filled out the required paperwork, handed money to the cashier, and walked out of the store with it) lacks merit. Section 922's provisions focus on the substance of firearm transactions and the actual recipient of the weapons. This understanding of the statute is confirmed by agency law principles, which make an undisclosed principal a party to a contract entered into by his agent. It is also confirmed by the statute's detailed provision limiting a dealer's ability to sell a firearm to a physically absent buyer, 18 U.S.C. 922(c), a provision that would serve no purpose if the absent buyer could simply obtain a firearm through an agent. Section 922's other record-keeping and identity-confirming provisions would also be largely ineffectual if recording and confirming the identity of a straw purchaser—who has only ephemeral control over the firearm—were deemed to satisfy them.

Petitioner's alternative contention that his false statement was not material because his uncle was legally eligible to obtain a firearm also fails. The statute prohibits false statements material to the

lawfulness of "*the* sale," *i.e.*, the one between the buyer and the dealer, not some other hypothetical sale involving an absent party. 18 U.S.C. 922(a)(6) (emphasis added). And the true identity of a firearm purchaser is always material to a sale by a dealer. Congress placed significant regulatory obligations on firearm dealers because they were in the best position to ensure that the various requirements of federal firearms law were satisfied. Petitioner's construction of the statute, in which a firearm purchaser can effectively take that responsibility away from the dealer when he is buying a weapon on behalf of someone he believes is eligible to own it, would subvert the statutory scheme.

Petitioner reasons that the only purpose of the sales restrictions in Section 922 is to keep firearms out of the hands of ineligible buyers and that the statute should not apply where that purpose is not implicated. Petitioner's premise is mistaken. While the goal of preventing felons and other ineligible individuals from obtaining firearms was plainly an important purpose of the statute, it was not the only one. In particular, Congress regulated firearm transactions in order to permit the tracing of weapons found at crime scenes. That purpose is implicated even when a straw purchase is made on behalf of an individual eligible to obtain a firearm himself.

Petitioner's contention that the firearm dealer could have lawfully sold him the Glock 19 handgun even if he had truthfully disclosed he was not the actual buyer is not correct. Such a sale in the acknowledged absence of the actual purchaser would have violated several provisions, including Section 922(c),

which strictly regulates sales to physically absent buyers.

2. Petitioner's false statement also violated the separate prohibition on misrepresentations with respect to "information required by this chapter to be kept in the records" of federally licensed firearm dealer. 18 U.S.C. 924(a)(1)(A). Petitioner falsely said he was the firearm's actual purchaser, resulting in the recording of incorrect information the dealer was legally required to maintain. Petitioner's effort to carve out from this provision information required to be maintained by regulations, as opposed to the statute itself, misconstrues the statutory scheme. In any event, that argument is beside the point because the identity information at issue here was required by Section 922 itself to be kept in the dealer's records. See, *e.g.*, 18 U.S.C. 922(b)(5).

ARGUMENT

I. PETITIONER VIOLATED 18 U.S.C. 922(a)(6) BY FALSELY STATING HE WAS THE ACTUAL BUYER OF THE HANDGUN

Section 922(a)(6) of Title 18 of the United States Code makes it unlawful "for any person in connection with the acquisition * * * of any firearm * * * from a * * * licensed dealer * * * knowingly to make any false or fictitious oral or written statement * * *, intended or likely to deceive such * * * dealer * * * with respect to any fact material to the lawfulness of the sale * * * under the provisions of this chapter." 18 U.S.C. 922(a)(6). Petitioner's conduct was covered by this prohibition. He knowingly made a false statement—that he was not purchasing the handgun on behalf of another—to a licensed firearm dealer. That false statement was

"likely to deceive" the dealer "with respect to" a "fact material to the lawfulness of the sale," namely the identity of the firearm's actual purchaser.

A. The True Identity Of A Firearm Purchaser Is Material To The Lawfulness Of The Sale

The "fact" of a firearm purchaser's identity is always "material to the lawfulness of the sale" to him. 18 U.S.C. 922(a)(6). Accordingly, the fact that an individual is formally completing the sale on behalf of another, who is the actual purchaser because he is paying for the firearm and will take possession of it, is material to the lawfulness of the sale.

A statement is "material" when it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted); see *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995) (same). The Court has emphasized that the determination of whether a falsehood is material "does not lend itself to mechanical resolution." *Kungys*, 485 U.S. at 771. In particular, "[i]t has never been the test of materiality that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision." *Ibid.*

Instead, the question in a materiality inquiry is "whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Kungys*, 485 U.S. at 771. This approach reflects the materiality requirement's roots in the common-law perjury offense, which did not cover false statements regarding "trifling collateral circumstances, to which no regard

is paid." *Id.* at 769 (quoting 4 William Blackstone, *Commentaries* *137).

The "lawfulness of the sale" of a firearm by a federally licensed dealer—to which the false statement must be "material" under 18 U.S.C. 922(a)(6)—is governed by various provisions in 18 U.S.C. 922. In particular, before "sell[ing] or deliver[ing]" "any firearm * * * to any person," the dealer must note that person's "name, age, and place of residence" in its records. 18 U.S.C. 922(b)(5). In addition, the dealer must "verif[y] the identity of the transferee by examining a valid identification document" with a photograph. 18 U.S.C. 922(t)(1)(C). The dealer must also submit the purchaser's identity information to the National Instant Criminal Background Check System and complete the sale only if that system provides a "unique identification number" approving it, or if three business days have passed and that system has not disapproved the sale. 18 U.S.C. 922(t)(1)(B).

Section 922 also makes it unlawful to sell a firearm to any person when the seller "know[s] or ha[s] reasonable cause to believe that such person" falls into one of a variety of prohibited categories. See 18 U.S.C. 922(d)(1) (under indictment for, or convicted of, a felony); (d)(2) (fugitive from justice); (d)(3) ("an unlawful user of or addicted to any controlled substance"); (d)(4) ("adjudicated as a mental defective" or having been "committed to any mental institution"); (d)(5) (an alien not lawfully present in the United States); (d)(6) (dishonorably discharged from the Armed Forces); (d)(7) (a person who has renounced his United States citizenship); (d)(8) (individual subject to a qualifying protective order); (d)(9) (person convicted of a misdemeanor crime of domestic vio-

lence). It is also generally unlawful for a licensed firearm dealer to sell or deliver a firearm to a juvenile (and a handgun to a purchaser under 21), 18 U.S.C. 922(b)(1), and a handgun to a resident of a State other than the one where the dealer's business is located, 18 U.S.C. 922(b)(3).

Against the backdrop of the highly regulated nature of firearms sales by federally licensed dealers, petitioner's false statement that he was the "actual buyer" of the Glock 19 handgun was "material to the lawfulness of the sale." 18 U.S.C. 922(a)(6). Indeed, few facts, if any, are more "material to the lawfulness of [a firearm] sale" (*ibid.*) than the identity of the buyer because knowledge of purchaser identity is necessary to the application of all of the statute's requirements and prohibitions. See *United States* v. *Anaya*, 615 F. Supp. 823, 825 (N.D. Ill. 1985) ("Congress made identity per se material within the terms of Section 922(a)(6).").

By concealing the name of the actual buyer of the handgun, petitioner prevented the licensed dealer from accurately recording that buyer's name in its records, 18 U.S.C. 922(b)(5), and from verifying that buyer's identity, 18 U.S.C. 922(t)(1)(C). The false statement also prevented the dealer from submitting the actual buyer's identity information to the National Instant Criminal Background Check System for approval of the purchase. 18 U.S.C. 922(t)(1)(B). The false statement further prevented the dealer from determining whether the actual buyer was prohibited from receiving a firearm. 18 U.S.C. 922(b) and (d). In sum, the various provisions of 18 U.S.C. 922 make clear that a firearm purchaser's true identity is critical information that is anything but a "trifling collat-

eral circumstance[], to which no regard is paid." *Kungys*, 485 U.S. at 769 (quoting 4 William Blackstone, *Commentaries* *137). It is therefore material.

B. Petitioner's Contention That His False Statement About The Firearm's Actual Buyer Was Not Material Lacks Merit

Petitioner advances two distinct arguments for the proposition that his false statement on Form 4473 was not material to the lawfulness of the purchase. First, petitioner contends (Br. 30-31) that *he* was the handgun's actual buyer for purposes of federal law and that the fact that he was purchasing the firearm on behalf of another individual was legally irrelevant no matter who that individual was. Second, petitioner contends (Br. 28-30) in the alternative that even if a firearm purchaser's false statement that he was the actual buyer is sometimes material, it would be material only when the absent actual buyer was himself ineligible to make the purchase. Both contentions lack merit.

1. Petitioner was not the actual buyer of the firearm under federal law

a. Petitioner's broadest contention (Br. 24, 30-31) is that he was in fact the "actual buyer" of the handgun for purposes of Section 922. Petitioner observes (*id.* at 31) that he, not his uncle, "was the person who filled out the form, underwent a background check, paid for the gun, and physically took possession of it." Based on those circumstances, petitioner contends (*ibid.*) that his "false statement that he was the 'actual buyer,' as that term is uniquely identified in Question 11.a, was not material to the *lawfulness* of the sale because, as a legal matter * * *, he *was* the actual

buyer regardless of which box he checked on Question 11.a."

Under this reading of Section 922, an individual wishing to purchase a firearm from a federally licensed dealer could enter the premises with a straw purchaser, instruct him which firearm to buy, hand him the money to pay for it, and then take possession of the firearm from the straw purchaser immediately after the sale is completed—without ever having his name recorded, his identity checked, or his eligibility to receive a firearm confirmed.[1] And the straw purchaser could falsely state on Form 4473 that he was the "actual buyer" (as the true actual buyer looked over his shoulder), without violating Section 922(a)(6). This contention fails for several reasons.

i. The provisions of Section 922, when read in light of each other and the purpose of the statute as a whole, address substance, not empty formalities. Indeed, agency law, against whose backdrop Section 922 was enacted, has long provided that "[h]e who acts through another acts himself." *United States* v. *Moore*, 109 F.3d 1456, 1461 (9th Cir.) (en banc), cert. denied, 522 U.S. 836 (1997). For that reason, "[a]n undisclosed principal is bound by contracts and conveyances made on his account by an agent acting within his authority" (unless the contract expressly excludes him). 1 Restatement (Second) Agency § 186

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[1] The scenario in which the actual buyer accompanies the straw purchaser to a licensed firearm dealer's store and directs the straw purchaser to buy a firearm for the actual buyer while causing the straw purchaser to complete the ATF Form 4473 is not unusual. *E.g.*, *United States* v. *Bowen*, 207 Fed. Appx. 727, 729 (7th Cir. 2006); *United States* v. *Paye*, 129 Fed. Appx. 567, 570 (11th Cir. 2005) (per curiam).

(1958); see 2 Restatement (Second) Agency § 322 (1958) (noting that the agent is also a party to the transaction); see also 2 Restatement (Third) Agency § 6.03 (2006). As a result, when a principal provides the funds for a firearm purchase and sends an agent to act on his behalf, the absent individual is the actual buyer under standard principles of agency law.

Accordingly, the "name, age, and place of residence" that Section 922(b)(5) requires the licensed dealer to record are those of the principal, *i.e.*, the actual buyer of the firearm. 18 U.S.C. 922(b)(5). Congress explained that it viewed this record-keeping requirement as "implement[ing] each of the controls imposed by" the statute. H.R. Rep. No. 1577, 90th Cong., 2d Sess. 14 (1968) (House Report). That implementation would be dramatically undermined if it could be satisfied by recording the name of only a straw purchaser.

Likewise, the "identity" the dealer must "verif[y]" by examining photo identification, 18 U.S.C. 922(t)(1)(C), and the name it is required to submit to the National Instant Criminal Background Check System for approval of the purchase, 18 U.S.C. 922(t)(1)(B), are those of the individual who will actually receive the firearm. Petitioner's contrary reading, under which these provisions would be completely satisfied by the identity of a straw purchaser with only ephemeral control of the firearm, would render them utterly ineffectual in carrying out Congress's obvious purpose in enacting them, *i.e.*, to ensure that those coming into possession of firearms from licensed dealers are eligible to do so and that their identities are known.

ii. This commonsense understanding of Section 922's requirements is confirmed by the language Congress used in Section 922(a)(6). It applies to false statements made "in connection with the *acquisition* or attempted acquisition of any firearm," rather than just a sale or a purchase. 18 U.S.C. 922(a)(6) (emphasis added). The Court has explained that the word "acquisition" in this provision is not limited by concepts of "legal title" or formal "ownership." *Huddleston* v. *United States*, 415 U.S. 814, 820 (1974). Instead, it has a practical, physical meaning; the "word 'acquire' is defined to mean simply 'to come into possession, control, or power of disposal of.'" *Ibid.* (quoting *Webster's Third New International Dictionary* 18 (1966)); see *id.* at 823. The Court has further explained that this substance-over-form reading of Section 922(a)(6) is reinforced by its separate reference to "the lawfulness of the sale *or other disposition*" of a firearm. 18 U.S.C. 922(a)(6) (emphasis added); see *Hudleston*, 415 U.S. at 826. That language "was aimed at providing maximum coverage." *Id.* at 826-827. In this case, the "sale or other disposition" were to petitioner's uncle: he was "acqui[ring]" the firearm (and was the recipient of its "disposition") because—from payment to outcome—the entire point of the transaction was to deliver it into his hands. 18 U.S.C. 922(a)(6).

iii. Section 922's focus on the identity of the actual purchaser of the firearm is reinforced by the provision's tight restrictions on sales to physically absent buyers. See 18 U.S.C. 922(c); see also 27 C.F.R. 478.96, 478.124(f). The statute provides that a federally licensed dealer "may sell a firearm to a person who does not appear in person at the licensee's business

premises * * * *only if*" a series of conditions are satisfied. 18 U.S.C. 922(c) (emphasis added). In particular, the absent buyer must submit a "sworn statement" that he meets the relevant age minimum and that he is not statutorily prohibited from receiving the firearm under federal, State, or local law, and providing the name of the "principal law enforcement officer of the locality to which the firearm will be delivered." 18 U.S.C. 922(c)(1). The dealer must then mail the sworn statement and a description of the firearm to that law enforcement officer, receive a return receipt, and wait a week before shipping the firearm to the absent buyer. 18 U.S.C. 922(c)(2)-(3).

Section 922(c) provides the statutory scheme's exclusive mechanism for a physically absent person to purchase a firearm from a federally licensed dealer. Those carefully detailed restrictions would be rendered largely superfluous if such absent buyers could easily circumvent them by simply obtaining a firearm through a straw purchaser instead.

iv. Finally, petitioner's broad contention that federal law does not prohibit straw purchases of any kind would mean that an individual could purchase a firearm on behalf of a convicted felon (or otherwise statutorily ineligible individual), falsely deny he was doing so, and not violate Section 922(a)(6).[2] That would fly in the face of the "principal purpose" of the Gun Con-

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[2] In that case, the later transfer between the straw purchaser and the actual buyer would itself still violate federal law. See 18 U.S.C. 922(d). As petitioner recognizes (Br. 8), however, that would not have been true at the time of Section 922(a)(6)'s enactment, given that the prohibition on sales to ineligible purchasers applied only to dealers until 1986. See p. 22, *infra*.

trol Act of 1968,[3] which was "to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" *Huddleston*, 415 U.S. at 824 (quoting S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968)). If straw purchases for ineligible buyers were "insulated from the law's registration provisions, the effect would be tantamount to a repeal of those provisions." *United States* v. *Lawrence*, 680 F.2d 1126, 1128 (6th Cir. 1982) (per curiam). It is therefore not surprising that, as petitioner himself has emphasized, none of the lower courts has adopted this reading of the statute. Pet. Br. i ("The lower courts uniformly agree that a buyer's intent to resell a gun to someone who cannot lawfully buy it is a fact 'material to the lawfulness of the sale.'") (quoting 18 U.S.C. 922(a)(6)).[4]

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[3] Sections 921-928 of Title 18 of the United States Code were originally enacted as part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 226-234. Those provisions were superseded later in 1968 by the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1214-1226, which was almost identical except for extending coverage to certain transactions involving long guns as well as handguns. The 1968 statutes replaced the Federal Firearms Act, ch. 850, 52 Stat. 1250.

[4] Petitioner suggests that the ban on straw purchases is arbitrary because an individual can purchase a firearm as a gift for another without violating the statute. Br. 26 n.3; see W. Va. Amicus Br. 3, 13; NRA Amicus Br. 14-15. Even if correct, that contention would not entitle petitioner to make a false statement when purchasing a firearm, see p. 34, *infra*, and petitioner does not claim the Glock 19 was a gift for his uncle. In any event, the distinction the ATF draws (Supp. J.A. 4 ("[I]f Mr. Brown goes to buy a firearm with his own money to give to Mr. Black as a present, Mr. Brown is the actual transferee/buyer of the firearm and should answer "YES" to question 11.1.")) is reasonable. A person who

b. Petitioner makes an elaborate argument based on legislative history (Br. 4-11, 26-27, 29) that courts inappropriately created the "straw purchaser doctrine" to fill gaps they perceived in federal gun regulation. Petitioner is incorrect. As discussed above, the liability of an individual for falsely stating he is the actual buyer of a firearm flows directly from the text of Section 922(a)(6) and related provisions, not from any judge-made doctrine. Use of Section 922(a)(6) to prosecute straw purchases is thus not an "expansion of the Act's plain text through a court-created legal doctrine" (Pet. Br. 26) but instead a straightforward application of the provision to a common scheme for violating it.

Indeed, the concept of a straw purchaser is not unique to firearm transactions; it describes any scenario in which "a third party * * * is put up in name only to take part in a transaction." *Black's Law Dictionary* 1421 (6th ed. 1990). Such schemes can result in the violation of various statutory prohibitions. *E.g.*, *Gaudin*, 515 U.S. at 508 (straw purchasers used to buy real property as part of mortgage scheme); *Darby* v. *Cisneros*, 509 U.S. 137, 139-140 (1993) (straw purchasers used to circumvent mortgage insurance restrictions); *United States* v. *One 1936 Model Ford V-8 De Luxe Coach, Comm. Credit Co., Claimant*, 307 U.S. 219, 224 (1939) (bootlegger used

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purchases a firearm as a gift for another person using the gift giver's own money is not acting as the recipient's agent, and the gift recipient is in no way a party to the transaction. And, as a practical matter, a prohibited person is more likely to obtain a firearm through a planned straw purchase than an unanticipated or unrequested gift.

straw purchaser to buy vehicle used to transport liquor).

Petitioner notes (Br. 8) that Congress in 1986 amended Section 922(d) to make it unlawful for an unlicensed individual to sell a firearm to an ineligible person. See Firearm Owners Protection Act, Pub. L. No. 99-308, § 102(5)(A), 100 Stat. 451-452. In making that amendment, however, Congress did *not* amend Section 922(a)(6), thus undercutting petitioner's suggestion that the amendment was intended to eliminate liability for those who purchase firearms for others while falsely denying they are doing so. In amending Section 922(d), Congress closed a loophole that allowed any unlicensed individual to transfer a firearm to an ineligible person *regardless* of how he acquired it. Specifically, the loophole applied both to transactions between a straw purchaser and an ineligible individual and to transactions between an individual who acquired the firearm for himself and later decided to transfer it to the ineligible person. By closing that loophole, amended Section 922(d) therefore applies in some circumstances (*i.e.*, those not involving straw purchases) where Section 922(a)(6) would not—just as Section 922(a)(6) will apply in some circumstances (*i.e.*, those where the actual buyer is not ineligible) where Section 922(d) would be inapplicable. And the possibility that some conduct may fall within both prohibitions does not provide cause for reading either of them other than according to their plain terms. See *United States* v. *Batchelder*, 442 U.S. 114, 118-126 (1979).

2. *The legal eligibility of the actual buyer to acquire a firearm is irrelevant to the materiality question*

"Even if this Court believes the straw purchaser doctrine is valid as a general principle," petitioner contends, "the Court should hold that it does not apply in a case like this one, where an individual purchases a gun on behalf of another *lawful* purchaser." Pet. Br. 28; see *id.* at 28-30. Petitioner's fallback argument fares no better than his broader submission.

a. As petitioner elsewhere recognizes (Br. 21), "Section 922(a)(6) criminalizes false statements 'material to the lawfulness of *the sale*,'" *i.e.*, "the firearm sale *in this case*." See 18 U.S.C. 922(a)(6). Accordingly, the relevant question is whether petitioner's false statement was material to the transaction that actually occurred, not to petitioner's later transfer of the handgun to his uncle or to a hypothetical transaction between his uncle and Town Police Supply. For the reasons discussed above (pp. 12-22, *supra*), the identity of the principal behind the purchase was material to the only transaction that mattered here because federal law required that identity to be corroborated, recorded, and screened for eligibility. Under this scheme, the identity of the purchaser has a "natural tendency" to influence the lawfulness of the sale, *Kungys*, 485 U.S. at 770, and is therefore material.

i. Petitioner's contrary reading of the statute would subvert it. Congress placed the obligation to conduct identity- and eligibility-related inquiries on firearm dealers for a reason. The Gun Control Act makes the dealer "the principal agent of federal enforcement." *Huddleston*, 415 U.S. at 824; see Pub. L. No. 90-351, § 901(a)(3), 82 Stat. 225 (congressional finding that "adequate Federal control * * * over

all persons engaging in the business[] of * * * dealing in" firearms is necessary to address illegal use of weapons). The dealer must be licensed and maintain adequate records, and it is subject to criminal and regulatory liability if it "dispos[es] of a weapon contrary to the provisions of the Act." *Huddleston*, 415 U.S. at 824 (citing 18 U.S.C. 922(a)(1), 923(a) and (g), 924). Congress channeled retail and wholesale firearm sales through dealers so that those highly regulated entities, which are expected to be familiar with firearm regulation, could "insure that, in the course of sales or other dispositions * * * , weapons could not be obtained by individuals whose possession of them would be contrary to the public interest." *Id.* at 825.[5]

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[5] The legislative history emphasizes the importance members of Congress placed on the requirement that most firearm purchases take place in person so that the dealer could ensure compliance with legal requirements. *E.g.*, House Report 13 ("The requirement that one [who] obtains a firearm or ammunition from a Federal licensee must properly identify himself is inherent in" Section 922(a)(6).); 114 Cong. Rec. 22,771 (1968) (Remarks of Rep. Railsback) ("We are saying that we want some dealer to see the purchaser, to see if he is a capable and competent person. * * * I simply want to ban the interstate mail-order sales because I am convinced from testimony that I have heard and from statements made to me by the Treasury Department that approximately 40 percent of the people give false and fictitious names."); *id.* at 16,951 (Remarks of Sen. Ribicoff) ("Weapons of this nature must be purchased in person. That is fundamental."); *id.* at 26,717 (Remarks of Sen. Dodd) (discussing requirement "that those who buy and keep guns in their possession appear personally before a licensed dealer, so that the law-enforcement authorities may be fully informed as to whether the buyer is eligible to buy and keep a gun").

Petitioner's position is that this entire dealer-based regulatory scheme can be bypassed—and that a straw purchaser can legally make a false statement purporting to be the actual buyer—whenever it turns out that the actual buyer of the firearm was legally eligible to receive it. On his view, such a false statement would be immaterial. But that approach would frustrate important record-keeping and screening obligations that Congress imposed on *dealers* for every retail and wholesale firearm transaction. It would instead place the responsibility of ensuring that a firearm does not end up in the hands of an ineligible person exclusively in the hands of the unlicensed straw purchaser, who is unlikely to be familiar with the specifics of federal and state firearm eligibility law, who does not have access to screening databases, and who may not "know[] or hav[e] reasonable cause to believe" (18 U.S.C. 922(d)) that the transferee is ineligible—even if he is. That position cannot be reconciled with the statutory scheme making the licensed dealer the central figure in preventing ineligible buyers from acquiring firearms.

ii. Petitioner's position would significantly erode the restrictions in Section 922 on an even more fundamental level because, by logical extension, it would seemingly extend to other false statements on a Form 4473. For example, it is not clear why, under petitioner's view, a firearm buyer could not write an alias on Form 4473 and likewise provide the dealer with a forged photo identification but escape all liability under Section 922(a)(6) on materiality grounds so long as he was in fact legally eligible to make the purchase. The lower courts have consistently rejected that counter-intuitive reading of Section 922's identity re-

quirements. See, *e.g.*, *United States* v. *Crandall*, 453 F.2d 1216, 1217 (1st Cir. 1972) (rejecting that contention on the ground that 18 U.S.C. 922(b)(5) requires the dealer to "correctly record[]" the "'name, age, and place of residence' of the purchaser"); *Anaya*, 615 F. Supp. at 824-826 (rejecting argument that false identity of firearm purchaser "becomes material only if and when [the] misrepresentation effectively conceals a prior felony conviction, nonresidency in the state or some other condition the firearms law seeks to regulate"); see also *United States* v. *Queen*, 408 F.3d 337, 338 (7th Cir. 2005) (rejecting contention that "gun buyers may lie about a street address so long as they live within the state where the gun is sold," meaning that the sale would have been legal if they had disclosed their correct address); *United States* v. *Gudger*, 472 F.2d 566, 567-568 (5th Cir. 1972) (same).[6]

iii. Petitioner's interpretation of the statute would undermine Section 922's protections in another fundamental way. Because materiality is an element of

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[6] In prosecutions for making a materially false statement under 18 U.S.C. 1001, the courts of appeals have consistently held that a person's false statement as to his identity is material. *E.g.*, *United States* v. *Adekanbi*, 675 F.3d 178, 183 (2d Cir. 2012) (holding that defendant's use of false name during proffer session with government was material because "[g]iving a false identity can impede the government's ability to develop information about the subject crime, and to inform itself about the defendant and any relevant criminal history"); *United States* v. *Popow*, 821 F.2d 483, 487-488 (8th Cir. 1987) ("It cannot be seriously asserted that the use of a fictitious identification did not have the capability of influencing the inspector's decision as to whether to grant [defendant the] privilege" of entering the United States.); *United States* v. *Parten*, 462 F.2d 430, 432 (5th Cir.) (rejecting contention that false name used to enter country was not material), cert. denied, 409 U.S. 983 (1972).

the Section 922(a)(6) offense, the government bears the burden of establishing it. Under petitioner's view of the statute (Br. 28-30), that would apparently mean that the government would have to prove the actual purchaser's ineligibility to possess the firearm. Yet in some straw purchaser cases, neither the government nor the straw purchaser knows who the actual buyer was. See, *e.g.*, *United States* v. *Juarez*, 626 F.3d 246, 249 (5th Cir. 2010) (actual buyer in Section 924(a)(1)(A) case was known to straw purchaser "only as 'El Mano'"). Under those circumstances, it would likely be difficult, if not impossible, for the government to establish the ineligibility of the unknown actual purchaser to receive a firearm, thus effectively taking Section 922(a)(6) liability off the table in a particularly dangerous category of straw purchase cases.

iv. Petitioner's argument also rests on the flawed premise that the Gun Control Act was intended only to prevent firearms from falling into the hands of ineligible persons. That was certainly a key objective of the statute, but not its only one. See *Anaya*, 615 F. Supp. at 825. Congress also wanted federally licensed dealers to maintain accurate records about firearm sales so that law enforcement could use those records to trace firearms used in crimes, regardless of whether an eligible buyer purchased the firearm from the dealer.[7] Congress accordingly authorized the Attor-

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[7] The D.C. Circuit recently provided this explanation of firearm tracing:

> Law enforcement agencies use tracing to link a suspect to a firearm in a criminal investigation; to identify potential traffickers; and to detect patterns in the sources and kinds of firearms used in crime. In other words, tracing serves as a valuable tool for investigating drug crimes. Tracing begins when a

ney General to obtain any records required to be kept by licensed dealers, 18 U.S.C. 923(g)(5)(A), and required dealers to "respond immediately" to a request from the Attorney General for such record information "as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation," 18 U.S.C. 923(g)(7). See *10 Ring Precision, Inc.* v. *Jones*, 722 F.3d 711, 715 (5th Cir. 2013) (discussing ATF tracing of firearms); *National Shooting Sports Found., Inc.* v. *Jones*, 716 F.3d 200, 204 (D.C. Cir. 2013) (same).

The government's interest in tracing a firearm to the person who purchased it from a licensed dealer exists regardless of whether that person was eligible to buy a firearm; eligible persons may acquire firearms that are later used in crimes. *E.g.*, *Queen*, 408 F.3d at 388 (during a six-month period, defendant purchased 39 guns, "and at least eleven of them later

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> law enforcement officer recovers a firearm used in a crime and makes a trace request by entering the firearm's identifying information—*e.g.*, serial number, caliber, make and model—into a database called the ATF Firearms Tracing System. ATF compares the identifying information to other firearms transactions records to determine[] the firearm's entry point into U.S. commerce and its path through the distribution chain. Because [federal law] limits ATF's ability to collect and maintain firearms transactions records, however, most of the records are kept by individual [licensed firearm dealers] and not routinely provided to ATF. Therefore, ATF often relies upon [dealer] records when it seeks to trace a firearm. Specifically, ATF must contact the manufacturer(s) or importer, then the wholesaler, and then the [dealer], who then provides [within twenty-four hours, see 18 U.S.C. § 923(g)(7)] information about to whom the firearm was sold.
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> *National Shooting Sports Found., Inc.* v. *Jones*, 716 F.3d 200, 204 (2013) (internal quotation marks and citations omitted).

were recovered at crime scenes"). And in a case where the actual buyer and the straw purchaser are not well acquainted and the gun is later used in a crime, the government's effort to trace the firearm would be substantially hindered because the trace would likely end with the discovery of the identity of the straw purchaser. *E.g.*, *Juarez*, 626 F.3d at 249 (actual buyer whom straw purchaser knew "only as 'El Mano'" hired straw purchaser to buy numerous military-style assault rifles, some of which were found in the possession of gang members in Mexico).

v. Finally, contrary to the contentions of petitioner and his amici, affirmance of petitioner's conviction would not mean that ATF has "add[ed] a new prohibition into the [Gun Control Act] that does not exist," *i.e.*, a prohibition on "transfer[s] of firearms between two non-prohibited persons." NRA Amicus Br. 17; see W. Va. Amicus Br. 2. Petitioner's offense is based on his *knowingly* having made a material false statement at the time he purchased the handgun, not on the later transfer to his uncle. Nothing in the statute prevented petitioner from selling his uncle a firearm—assuming the uncle was legally eligible and that they complied with the requirements for interstate transfers—so long as petitioner did not make a knowing false statement to the dealer at the time he purchased it.

b. In all events, petitioner's uncle would not have been a "*lawful* purchaser" (Pet. Br. 28) of the Glock 19 at the Virginia gun shop. Dealers are prohibited from selling handguns to "any person who the licensee knows or has reasonable cause to believe does not reside in * * * the State in which the licensee's place of business is located." 18 U.S.C. 922(b)(3). The

dealer here is located in Virginia (Supp. J.A. 3), and petitioner's uncle is a resident of Pennsylvania (J.A. 26a).[8]

3. The dealer could not have lawfully sold petitioner the handgun if petitioner had truthfully disclosed that he was not the actual buyer

Petitioner contends (Br. 23) that "the gun dealer lawfully could have sold the gun to petitioner regardless of his answer to Question 11.a." That is incorrect.

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[8] Amicus West Virginia's contention (Br. 14-17) that the federal prohibition on straw purchases impinges on state authority is incorrect. To the contrary, Section 922 in general, and the prohibition on straw purchases in general, protect state prerogatives. In enacting those provisions, Congress found that out-of-state sales of firearms "ha[d] materially tended to thwart the effectiveness of State laws and regulations, and local ordinances." § 901(a)(4), 82 Stat. 225. As a result, Congress found that "only through" federal regulation of firearm dealers could "effective State and local regulation of [firearm] traffic" be made possible." § 901(a)(3), 82 Stat. 225. Federal law thus prohibits a dealer from selling "any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any *State* law," 18 U.S.C. 922(b)(2) (emphasis added), and it also prohibits sales of handguns to out-of-state residents, 18 U.S.C. 922(b)(3). West Virginia correctly observes (Br. 14-15) that States have made different choices regarding firearm regulation, but those choices would be significantly undermined if a state resident could easily circumvent them by obtaining a firearm through a straw purchase in a State with different rules.

West Virginia's further contention (Br. 18) that the Court cannot affirm in this case without "resolv[ing] the debate" over whether the federal prohibition on licensed firearm dealer sales of handguns to 18- to 20-year-olds, 18 U.S.C. 922(b)(1), is consistent with the Second Amendment is incorrect. Petitioner's uncle was not in that age range, so that constitutional question is not implicated here.

a. As an initial matter, petitioner premises this argument on an incorrect legal standard. "It has never been the test of materiality that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision." *Kungys*, 485 U.S. at 771. Instead, a misrepresentation is material if it "was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Ibid.* For the reasons discussed previously—*i.e.*, that the entire dealer-based regulatory scheme depends on recording and tracking the identity of a firearm's actual buyer and prevents absentee-buyer transactions that do not comply with federal law—that standard is satisfied here.

In any event, petitioner's false statement was material even under petitioner's overly demanding test. If petitioner had answered Question 11.a truthfully by stating that he was not the actual buyer, the dealer could not have lawfully sold him the firearm. See generally *Shawano Gun & Loan, LLC* v. *Hughes*, 650 F.3d 1070, 1075 (7th Cir. 2011) (affirming revocation of firearm dealer license based in part on "willful transfer of firearms on three occasions to persons who indicated on ATF Forms 4473 that they were not the actual buyer of the firearms").

As noted above (pp. 18-19, *supra*), Section 922 permits a dealer to "sell a firearm to a person who does not appear in person at the licensee's business premises * * * *only if*" certain strict conditions are satisfied. 18 U.S.C. 922(c). If an individual on a dealer's premises told the dealer that an absent party was the actual buyer and the dealer proceeded with the sale any way, the dealer would have violated Section 922(c) because it would have sold a firearm to the

absent party without satisfying that provisions' requirements. The dealer likewise would have violated the requirements that it verify and record the name of the actual purchaser of the firearm. See 18 U.S.C. 922(b)(5) and (t)(1)(c); see p. 13, *supra*. Finally, if a dealer completed a sale under those circumstances and signed the required certification that it was his "belief" that the transfer was "not unlawful" (Supp. J.A. 3), the dealer would have knowingly made a "false entry" on a required form in violation of 18 U.S.C. 922(m).

The unlawfulness of a sale to an individual who stated on Form 4473 that he was not the "actual buyer" of the firearm would not come as a surprise to that individual or the dealer. The Form itself repeatedly states that a transfer cannot be made under those circumstances. See Supp. J.A. 1 ("**If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.**"); *id.* at 4 (dealer "may not transfer the firearm" to an individual who answers "no" to question 11.a); *id.* at 6 (dealer "should stop the transaction if * * * the buyer answers 'no' to question 11.a"). Indeed, the employees of the dealer where petitioner purchased the firearm in this case were prepared to testify that they would not have completed the sale (both "as a matter of law" and "their store's policy") if they had known petitioner was not the actual buyer. J.A. 29a-30a.

b. Petitioner suggests that the instruction on Form 4473 (Supp. J.A. 1) that "**[i]f you are not the actual buyer, the dealer cannot transfer the firearm(s) to you**" is invalid because it was not promulgated pursuant to the notice-and-comment requirement of the Administrative Procedure Act (APA), 5 U.S.C. 553. Pet. Br. 9,

23; see NRA Amicus Br. 22-32. For a variety of reasons, this case does not afford any occasion to decide that question.

First, petitioner's APA claim is not properly before the Court. As noted above (pp. 6-7, *supra*), the district court rejected this claim in denying petitioner's *second* motion to dismiss, and petitioner did not appeal that decision. Pet. App. 9a & n.6. In fact, petitioner went further and expressly told the court of appeals that he was not pressing his "administrative deficiencies" claim based on Form 4473. *Ibid.*; see Pet. C.A. Br. 3. The court of appeals thus did not address the contention. This Court does not ordinarily decide questions "neither pressed nor passed upon" below, *Clark* v. *Arizona*, 548 U.S. 735, 765 (2006), especially where they were expressly abandoned.

Second, any claim that ATF violated the notice and comment requirements of the APA in promulgating the current version of Question 11.a in the mid-1990s is time-barred. See 28 U.S.C. 2401(a) (generally applicable six-year statute of limitation); *Impro Prods., Inc.* v. *Block*, 722 F.2d 845, 850 n.8 (D.C. Cir. 1983) (Section 2401(a) applies to APA claims), cert. denied, 469 U.S. 931 (1984); see also *United States* v. *Lowry*, 512 F.3d 1194, 1202-1203 (9th Cir. 2008) (finding criminal defendant's attempted defense based on APA challenge to regulatory action time-barred).[9]

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[9] Under certain circumstances, lower courts have permitted *substantive* challenges to administrative actions to be asserted in the context of party-specific adjudicatory proceedings even when such claims would otherwise be untimely. See *JEM Broad. Co.* v. *FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994); cf. *Yakus* v. *United States*, 321 U.S. 414, 431-446 (1944). But that rule does not apply to procedural challenges, such as notice-and-comment claims. *JEM*

Third, even assuming arguendo that the question on Form 4473 was promulgated in a procedurally defective manner, that would not provide a defense in a prosecution for lying in an answer to that question. "[O]ne who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself." *United States* v. *Knox*, 396 U.S. 77, 79 (1969). As this Court has explained, "it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked." *Bryson* v. *United States*, 396 U.S. 64, 72 (1969). "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly but he cannot with impunity knowingly and willfully answer with a falsehood." *Ibid.*; see *United States* v. *Mandujano*, 425 U.S. 564, 577 (1976) (plurality op.).

In any event, ATF was not required to use notice-and-comment procedures to change the "actual buyer" instructions on Form 4473. As petitioner notes (Br. 8) a previous version of the form stated that "[t]he sale or delivery of a firearm who is acting as an agent, intermediary, or 'straw purchaser' for someone whom the licensee knows or has reasonable cause to believe is ineligible to purchase a firearm directly, may result

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Broad. Co., 22 F.3d at 325 ("[C]hallenges to the *procedural lineage of agency regulations*, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement proceeding, will not be entertained outside the [statute of limitations].").

in a violation of the Federal firearm laws." *United States* v. *Ortiz-Loya*, 777 F.2d 973, 986 (5th Cir. 1985) (reprinting 1984 version of Form 4473). Likewise, an ATF "industry circular" from 1979 stated that the statute "does not necessarily prohibit a dealer from making a sale to a person who is actually purchasing the firearm for another person * * * so long as the ultimate recipient is not prohibited from receiving or possessing a firearm." ATF, Federal Firearm Regulation 63 (1984-1985) (reprinting Industry Circular 79-10).

Notwithstanding those statements, the Fifth Circuit in 1985 upheld a Section 922(a)(6) conviction where individuals falsely stated they were the firearm purchasers when in fact they were working as agents for the real purchaser, without any suggestion that the real purchaser was legally ineligible. *Ortiz-Loya*, 777 F.2d at 979. The court held that "[s]uch misstatements were clearly misrepresentations of material facts." *Ibid.* In 1994, ATF updated Form 4473 to reflect that same understanding and to incorporate the substance of the "actual buyer" instruction at issue here. See *United States* v. *Polk*, 118 F.3d 286, 295 n.7 (5th Cir.), cert. denied, 522 U.S. 988 (1997). ATF has likewise made consistently clear for at least 20 years that all straw purchases are prohibited, regardless of the eligibility of the firearm's ultimate recipient. *E.g.*, 1 *FFL Newsletter*, ATF (U.S. Dep't of Treasury, D.C.), 1992, at 1.

The APA's notice-and-comment requirement applies to legislative or substantive rules, but not to "interpretive" ones. 5 U.S.C. 553(b)(A); see *Lincoln* v. *Vigil*, 508 U.S. 182, 196 (1993). While a legislative rule has "legal effect," an interpretive rule merely repre-

sents the agency's view of applicable legal requirements. See *American Min. Cong.* v. *Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). The ATF statements at issue here are, at most, interpretive rules. The "actual buyer" question on Form 4473 expresses ATF's view that straw purchases are prohibited. But, for the reasons given above, it is the statute itself, not the Form 4473 instructions (or ATF statements in industry circulars), that makes such purchases unlawful.

II. PETITIONER VIOLATED 18 U.S.C. 924(a)(1)(A) BY MAKING A FALSE STATEMENT WITH RESPECT TO INFORMATION REQUIRED TO BE KEPT IN THE RECORDS OF A LICENSED DEALER

Section 924(a)(1)(A) of Title 18 prohibits "knowingly mak[ing] any false statement" with respect to "information required by this chapter to be kept in the records" of federally licensed dealer. Petitioner's false statement violated that prohibition.

Section 924(a)(1)(A) is broader than Section 922(a)(6) in one respect because it reaches "any false statement," not merely a false statement that is "material to the lawfulness of the sale." Congress' decision to include a materiality requirement in Section 922(a)(6), but to omit one in Section 924(a)(1)(A) is presumed to have been deliberate and intentional. *E.g.*, *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1894 (2013). Further, the statutory phrase "any false statement" by itself does not have an implicit materiality element. See *United States* v. *Wells*, 519 U.S. 482, 490 (1997). At the same time, Section 924(a)(1)(A) includes an element absent from Section 922(a)(6): the false statement must relate to "information required by this

chapter to be kept in the records" of a licensed dealer. 18 U.S.C. 924(a)(1)(A).

Petitioner's conduct violated Section 924(a)(1)(A) because he made a false statement (that he was the actual buyer of the firearm) with respect to "information required by this chapter to be kept in the records" of a dealer. The term "this chapter" in Section 924(a)(1)(A) refers to all of the statutory provisions of Chapter 44. Three provisions are particularly relevant to the issue. As noted above, Section 922(b)(5) requires a licensed firearm dealer to note in his records the "name, age, and place of residence" of every person who buys a firearm from him. Section 923(g)(1)(A) requires a dealer to "maintain such records of * * * sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe." Third, Section 926 directs the Attorney General to prescribe necessary rules and regulations to "carry out the provisions of this chapter." 18 U.S.C. 926(a).

Because Sections 923(g)(1)(A) and 926 specifically authorize the Attorney General to issue regulations to implement Chapter 44, the Attorney General's regulations governing information that a licensed dealer must acquire from a prospective gun buyer is information "required by this chapter" to be maintained by the dealer. In turn, under 27 C.F.R. 478.124(a), the Attorney General requires a licensed dealer to record every firearm transaction to an unlicensed individual "on a firearm transaction record, Form 4473." Thus, all the information required by the ATF Form 4473 is information required to be kept for purposes of Section 924(a)(1)(A). Further, the "actual buyer" ques-

tion is required information because it directly implements the directive in Section 922(b)(5) that a dealer note the "name" of the gun buyer in his records. See p. 17, *supra*.

Accordingly, when an individual purchases a firearm at the direction of, and for the use, of another person, but he states that he is the actual buyer of the firearm on the ATF Form 4473, he has made a false statement with respect to the information that is required to be kept in the records of a licensed firearm dealer in violation of Section 924(a)(1)(A). Every court of appeals that has considered the issue agrees. See Pet. App. 17a-18a; *United States* v. *Johnson*, 680 F.3d 1140, 1146-1147 (9th Cir. 2012); *United States* v. *Soto*, 539 F.3d 191, 198-199 (3d Cir. 2008), cert. denied, 555 U.S. 1116 (2009); *Nelson*, 221 F.3d at 1209.

Petitioner contends (Br. 34) that any information ATF's regulations require licensed dealers to maintain is not information required "*by this chapter* to be kept," 18 U.S.C. 924(a)(1)(A) (emphasis added), positing that the provision extends only to statutory requirements, not those that come from implementing regulations. Even if petitioner's crabbed reading of this provision were correct, his argument would fail because, as noted above, the statute itself requires a dealer to record "in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence" of each firearm purchaser. 18 U.S.C. 922(b)(5). Petitioner made a false statement "with respect to" *that* "information required by this chapter to be kept." 18 U.S.C. 924(a)(1)(A).

In any event, petitioner's reading of Section 924(a)(1)(A) as allowing false statements in records that ATF regulations require to be maintained is

unfounded. Chapter 44 does not itself impose detailed record-keeping requirements but instead requires licensed firearm dealer to "maintain such records * * * as the Attorney General may by regulations prescribe." 18 U.S.C. 923(g)(1)(A). Accordingly, the information covered by those regulations is required "by this chapter," *i.e.*, Section 923(g)(1)(A), "to be kept," 18 U.S.C. 924(a)(1)(A).

That interpretation is consistent with the rule that "regulations, if valid and reasonable, authoritatively construe the statute itself." *Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001); see *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 54, 58 (2007) (rejecting argument that private-right-of-action provision "authorize[d] only actions 'seeking damages for *statutory* violations' and not for 'violations merely of *regulations* promulgated to carry out statutory objectives'" on the ground that "to violate a regulation that lawfully implements [the statute's] requirements *is* to violate the statute"). Petitioner offers no explanation why Congress would have broadly delegated record-maintenance responsibilities to the Attorney General, while at the same time exempting the resulting record-keeping requirements from the protection of the statute's generally applicable false statement provision.

Petitioner observes (Br. 34) that, unlike Section 924(a)(1)(A), a different provision (involving forfeitures) expressly refers to violations of regulations. See 18 U.S.C. 924(d)(1). Regardless of whether that express reference to regulations was actually necessary in Section 924(d)(1), it was plainly not in Section 924(a)(1)(A), which expressly references "this chapter's" record-keeping requirements—which, in turn,

consist of requirements to keep such information as "the Attorney General may by regulations prescribe," 18 U.S.C. 923(g)(1)(A).

Petitioner's alternative argument (Br. 35-36) that ATF regulations do not require the licensed firearm dealer to maintain a record of the "actual buyer" of a firearm is incorrect. ATF regulations require the dealer to maintain a record of the buyer's "name, sex, residence address, [and] date and place of birth." 27 C.F.R. 478.124(c)(1). For the reasons discussed above involving 18 U.S.C. 922(b)(5)'s parallel elements, those requirements call for information on the actual purchaser, not just a straw. See p. 17, *supra*. In addition, ATF regulations require the dealer to "retain * * * as a part of the required records, each Form 4473 obtained in the course of transferring custody of the firearms." 27 C.F.R. 478.124(b). Accordingly, any false statement on Form 4473 is a false statement "with respect to the information required by this chapter to be kept in the records" of a federally licensed firearm dealer. 18 U.S.C. 924(a)(1)(A).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

No. 12-1493

IN THE

Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

It is not illegal to buy a gun for someone else. In the Gun Control Act of 1968, Congress chose a regulatory scheme that permits law-abiding citizens to buy guns with the intent to resell them. This was not an oversight; legislative history shows that Congress long understood buying guns for others was legal.

The government and its amici disagree with this intentional policy decision of Congress. And in their briefs, they freely admit that they favor the court-created straw purchaser doctrine because it does precisely what Congress chose not to do—prohibit individuals from buying firearms for other lawful gun owners. But the arguments advanced in defense of the straw purchaser doctrine are fatally flawed and should be rejected.

The government first contends that the straw purchaser doctrine is simply an application of the well-settled maxim that "he who acts through another acts himself." To be sure, this legal maxim is a part of criminal law—indeed, Congress codified it in 18 U.S.C. § 2, which provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." But petitioner was not convicted of a violation of § 2, and that is not the doctrine that the government actually invokes here. Instead, the government relies on a civil common-law agency rule providing that property purchased by an agent on behalf of an "undisclosed principal" belongs to the principal as a matter of law. This *civil* law doctrine cannot be applied to a federal *criminal* statute. Moreover, even in the civil law context, it is the

agent—not the undisclosed principal—who is considered the "buyer" of the goods. Thus, this civil law principle cannot justify the court-created straw purchaser doctrine applied by the lower court in this criminal case.

The government and its amici also argue that the straw purchaser doctrine is necessary to keep track of who actually owns firearms and to ensure that gun buyers have undergone background checks. This argument is premised on what the government and its amici *want* the law to be, not what it is. Congress made the intentional policy decision not to track every firearm sale and not to maintain a national gun registry. To the contrary, Congress permits most second-hand gun sales without any recordkeeping or background check at all. A rejection of the straw purchaser doctrine, therefore, would not be inconsistent with the recordkeeping and background check regime actually enacted by Congress.

In sum, the ability to buy guns for others is not an oversight or unintended consequence of the federal gun laws. Rather, it is a purposeful policy decision by Congress on a deeply divisive political issue—one that invariably results in compromise legislation. Because it is legal to buy a gun intending to resell it to someone else, and because the statutes and regulations governing gun sales do not require dealers to record whether a gun buyer plans to resell the gun, petitioner cannot be convicted of violating either § 922(a)(6) or § 924(a)(1)(A).

ARGUMENT

I. THE GOVERNMENT FAILS TO JUSTIFY APPLICATION OF THE COURT-CREATED STRAW PURCHASER DOCTRINE.

The government devotes most of its brief to defending the court-created straw purchaser doctrine. The government first argues that "agency law . . . has long provided that '[h]e who acts through another acts himself.'" Resp. Br. 16. The government contends that the straw purchaser doctrine is a straightforward application of this agency law rule. Resp. Br. 16.

To be sure, the concept of *qui facit per alium facit per se*, or he who acts through another acts himself, is part of federal criminal law. Indeed, like nearly all principles of modern federal criminal law, Congress has codified this rule. Title 18 U.S.C. § 2 provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

But the government fails to acknowledge that the straw purchaser doctrine is *not* an application of this criminal law principle. Here, the government is not seeking to hold petitioner's uncle responsible for petitioner's actions. Rather, the government contends that, because petitioner bought a gun intending to resell it to his uncle, petitioner did not actually buy the gun—his uncle did. This argument has several fatal flaws.

First, this principle does not exist in criminal law. Tellingly, the government supports its theory by citing the

Restatement (Second) of Agency for the proposition that "when a principal provides funds for a firearm purchase and sends an agent to act on his behalf, the absent individual is the actual buyer under standard principles of agency law." Resp. Br. 17. The Restatement is a summary of *civil* law, not *criminal* law. Criminal and civil agency law are not interchangeable, and for good reason. Courts and commentators have repeatedly acknowledged that civil agency law principles can impose liability in circumstances incompatible with criminal law doctrine. *See, e.g.*, *Montana v. Woolsey*, 259 P. 826, 833 (Mont. 1927) (holding that "the civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law"); *United States v. Food and Grocery Bureau of S. Cal.*, 43 F. Supp. 966, 973 (S.D. Cal. 1942) (rejecting an argument "applying to criminal law the civil law of agency" because that "cannot and should not be done").

This case underscores why civil agency law cannot be applied to federal criminal statutes. In criminal law, words are given their plain meaning and statutes are written to be understood according to their text. *Salinas v. United States*, 522 U.S. 52, 57 (1997). Here, the plain meaning of "buyer" or "actual buyer" is the person who buys the gun—*i.e.*, the person who walks into the store, fills out the forms, pays for the gun, and leaves the store having possession and control of it. In the context of plain meaning, it makes no difference what that buyer intends to do with the gun later. Indeed, dictionary definitions of the word "buyer" often include agents buying on behalf of someone else. *See* Webster's II New College Dictionary 151 (1995) (defining buyer to include "a purchasing agent"); Concise Oxford English Dictionary 191 (11th ed. 2004)

(defining buyer to include "a person employed to select and purchase stock for a business").

Here, the government asks this Court to alter the plain meaning of the term "actual buyer" based on a civil law doctrine not found in the text of the criminal law. This runs counter to centuries of settled precedent from this Court. "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.).

Moreover, the government grossly oversimplifies civil agency law in its brief. The government suggests that every time someone buys something for another person, a principal-agent relationship is created under civil common law. It is not that simple. "Agency is the *fiduciary relationship* that arises when one person (a 'principal') manifests assent to another person (an 'agent') *that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.*" Restatement (Third) of Agency § 1.01 (2006) (emphasis added). That agency relationship thus requires mutual assent for the agent to enter into a *fiduciary relationship* in which the agent's actions are controlled by the principal, and in which various legal duties are imposed on the agent to act in the principal's best interests. *See id.* & cmts. c, d, e. Moreover, "[a]n agency relationship arises *only*

when the elements stated in § 1.01 are present. Whether a relationship is characterized as agency in . . . popular usage is not controlling." Restatement (Third) of Agency § 1.02 (emphasis added).

This formal agency law relationship will not exist in most "straw purchases." For example, if a stranger on the street asks someone to walk into a nearby gun store and buy a gun for him, offering to pay a premium over whatever the gun costs, there is no agency relationship created. The buyer, if he chooses to enter the store and buy the gun, has not entered into a fiduciary relationship, has not consented to the control of the stranger, and is under no obligation to act in that stranger's best interests or even to deliver the gun after buying it.

Indeed, petitioner's case highlights the challenges of applying this complex civil law doctrine to the plain text of a criminal law. Petitioner received no consideration for buying the firearm for his uncle and was under no contractual obligation to do so. He was merely doing a favor for a family member and could have changed his mind at any time, even after buying the gun, and returned the check to his uncle. JA 26a-28a. Yet the government contends—without citing a single case applying common law agency principles—that doing a favor for one's uncle forms a binding principal-agent relationship with corresponding fiduciary duties as a matter of law. Resp. Br. 16-17.

In short, the government's civil agency law justification for the straw purchaser doctrine is fatally flawed. Even if a civil common-law legal fiction concerning the "actual buyer" of property could be applied to the *statutory*

federal criminal system, the mere fact that someone buys a gun for someone else is not enough to create the principal-agent relationship necessary to invoke that legal fiction. Accordingly, the Court should reject the government's agency law justification for the straw purchaser doctrine.

In any event, even the civil agency law principle on which the government relies does not support the government's theory. The government cites the Restatement section providing that "[a]n undisclosed principal is bound by contracts and conveyances made on his account by an agent acting within his authority." Resp. Br. 16. But the government ignores a critical point: even in the case of an undisclosed principal, it is still the agent (not the principal) who actually buys the goods. In the real estate context for example, the agent buys the property and records it in his own name, but is required by agency law to convey it later to the undisclosed principal. *See, e.g.*, *Shelby v. Burrow*, 89 S.W. 464, 464 (Ark. 1905). In that circumstance, civil agency law permits the seller to hold both the agent and the undisclosed principal responsible for the agent's actions, *see* Restatement (Third) of Agency § 6.03, but it does not change the fact that the *agent* is the "actual buyer" of the property and must later convey it to the principal in a separate transaction.

The government asserts several other flawed arguments in defense of the straw purchaser doctrine. First, it argues that the doctrine conforms with the "commonsense" interpretation of § 922(a)(6) because that statute governs "false statements 'in connection with the *acquisition* or attempted acquisition of any firearm.'" Resp. Br. 18. The government then quotes this Court's decision in *Huddleston*, a § 922(a)(6) case involving a

felon who pawned a firearm at a pawn shop and later retrieved it. In *Huddleston*, the Court explained that the "word 'acquire' is defined to mean simply 'to come into possession, control, or power of disposal of.'" Resp. Br. 18. But this language hurts—not helps—the government. At the time petitioner filled out the paperwork and bought the gun, *he*, not his uncle, was the person with "possession, control, or power of disposal of" the gun. Indeed, this "commonsense" understanding of words like "buyer" and "acquire" is precisely why the straw purchaser doctrine—a legal fiction running counter to the plain text—is impermissible in the criminal context. *Wiltberger*, 18 U.S. (5 Wheat.) at 95.

The government also argues that the separate restrictions on sales to physically absent buyers "would be rendered largely superfluous if such absent buyers could easily circumvent them by simply obtaining a firearm through a straw purchaser instead." Resp. Br. 19. But there is no "absent buyer" here. Congress created the "absent buyer" provisions for sales done by telephone, internet, or mail, where no one was physically present at the gun store. 18 U.S.C. § 922(c) (providing additional requirements before a "licensed dealer may sell a firearm . . . to a person *who does not appear in person at the licensee's business premises*") (emphasis added). Here, by contrast, petitioner was present at the gun store and truthfully provided all of the identification and contact information required by law.

The government next contends that "the concept of a straw purchaser is not unique to firearm transactions," citing several court decisions in other contexts. Resp. Br. 21. But none of those cases involve the straw purchaser

legal fiction that the government invokes here—a fiction from civil agency law that means the person who buys the firearm is not actually the buyer. For example, the government cites this Court's decision in *United States v. Gaudin*, 515 U.S. 506, 508 (1995), asserting that it involves "straw purchasers used to buy real property as part of a mortgage scheme." Resp. Br. 21. But the prosecution in *Gaudin* did not involve the straw purchaser doctrine; rather, the government alleged "that respondent had made false statements on [a federal form] by knowingly inflating the appraised value of the mortgaged property" and by stating that "the buyer was to pay some of the closing costs, whereas in fact he, the seller, had arranged to pay all of them." *Gaudin*, 515 U.S. at 508.

Likewise, the other cases cited by the government use the term "straw purchase" but have nothing to do with the legal fiction the government invokes here. Indeed, in *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219 (1939), the Court appears to have rejected the straw purchaser theory advanced by the government here. In that case, the Court described the purchase of a vehicle by a bootlegger's brother as a "straw purchase" because the bootlegger arranged the purchase and actually used the vehicle. But this Court treated the straw purchaser (the brother), not the ultimate recipient (the bootlegger), as the actual buyer of the vehicle to determine whether a credit company had an interest in the vehicle after its forfeiture. *Id.* at 224.

In short, the agency law theory advanced by the government to justify the straw purchaser doctrine is a novel one—it is not found in historical criminal common law or modern federal criminal statutes. This Court should

decline the government's invitation to change the scope of unambiguous criminal statutes by grafting on a court-created legal fiction that stems from civil law principles.

II. THE GOVERNMENT'S RECORDKEEPING AND TRACING ARGUMENTS CONFLICT WITH THE *INTENTIONAL* POLICY CHOICES OF CONGRESS.

The government and its amici also rely heavily on policy arguments concerning recordkeeping and background checks for gun sales. But, as explained below, these policy arguments do not justify a court-created doctrine at odds with the plain text of the Gun Control Act.

The government first contends that if the straw purchaser doctrine is not applied in all circumstances it "would frustrate important recordkeeping and screening obligations that Congress imposed on dealers for every retail and wholesale firearm transaction." Resp. Br. 25. The Brady Center makes a similar argument, focusing on the background check requirements enacted in the Brady Handgun Violence Prevention Act of 1993. The Brady Center concedes that this background check process "is designed to verify the eligibility of the person standing in front of the gun dealer" but argues that, without the straw purchaser doctrine, those guns can later be delivered to an "unknown principal" for whom no background check was done. Brady Ctr. Br. 11-12.

These policy arguments fail because they conflict with how Congress *intentionally* wrote the law. Private sales of firearms by law-abiding citizens have no recordkeeping or background check requirements at

all. Only the initial sale to "the person standing in front of the gun dealer," Brady Ctr. Br. 11, is subject to those recordkeeping and background check requirements. This was not an oversight; Congress chose not to place similar requirements on private and second-hand sales of firearms as part of the political compromise necessary to enact the Gun Control Act. 18 U.S.C. § 922(a)(3), (b)(3).

So, for example, the Gun Control Act permits a buyer to resell a firearm to the person standing behind him in line at a gun store, just moments after he bought it, without *any* recordkeeping or background check at all. 18 U.S.C. § 922(a)(3), (b)(3); Federal Firearms Regulations Reference Guide, ATF Publ'n 5300.4, at 176 (2005).[1]

The government also worries that, "in a case where the actual buyer and the straw purchaser are not well acquainted and the gun is later used in a crime, the government's efforts to trace the firearm would be substantially hindered." Resp. Br. 29. But again, that outcome necessarily results from how Congress wrote the law. Private citizens, unlike licensed dealers, have no

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1. The only exception to this rule is sales from a resident of one state to a resident of another state. In that case, the seller must deliver the gun to a dealer in the buyer's home state, who performs a background check on the buyer. *See* 18 U.S.C. §§ 922(a)(3), (a)(5), (b)(3), (d); 27 C.F.R. §§ 478.29, 478.30; *see generally* ATF Reference Guide, *supra*, at 177. But in that case, the policy concerns of the government and its amici are not even implicated, because both the initial sale and the second-hand sale involved full recordkeeping and background checks. Notably, that is precisely what happened in this case—both petitioner and his uncle filled out the necessary paperwork and underwent separate background checks with their respective purchases. *See* Pet. Br. 11-12.

obligation to record *any* information about a person to whom they sell a gun. *See* 18 U.S.C. §§ 922(a)(3), (a)(5), (d); 27 C.F.R. §§ 478.29, 478.30; *see also* ATF Reference Guide, *supra*, at 176. The way the law works, a gun buyer could purchase a firearm from a licensed gun dealer and promptly resell it to a complete stranger.

Moreover, the government and its amici ignore that Congress prohibited the government from even maintaining any information about guns or gun owners. In the Firearm Owners' Protection Act, Congress stated that after its passage the government is prohibited from establishing "any system of registration of firearms, firearm owners, or firearm transactions." 18 U.S.C. § 926. Thus, Congress knew that in every case, tracing guns would be a burdensome task. The government must start by matching the firearm's serial number with the manufacturer's records, follow that firearm in the stream of commerce to the distributors, then the gun dealer, then each subsequent private owner of the firearm. Resp. Br. 27 n.7. Tracing a firearm to the ultimate recipient of a "straw purchase" is no more burdensome than doing so for other private sales, for guns given as gifts, or for guns awarded to the winners of contests and raffles. *See* ATF Reference Guide, *supra*, at 165, 176-77, 195. The government concedes that sales in all of those circumstances are perfectly lawful with no background check at all.

In sum, these policy arguments of the government and its amici turn on what they *want* the law to be, not what it is. Congress chose a statutory scheme in which many lawful buyers—perhaps most buyers—do *not* fill out federal paperwork or undergo a background check. Indeed, Congress expressly prohibited the government

from establishing the sort of national gun database that the government and its amici advocate. Thus, applying the court-created straw purchaser doctrine does not advance the policy goals of the Gun Control Act and its amendments; Congress made the deliberate policy choice that only the *initial* buyers of a firearm from a licensed dealer would be subject to recordkeeping and background check requirements.

It is important for this Court to remain faithful to the deliberate choices Congress made in these federal gun laws. "As is often true, this legislation is the product of multiple and somewhat inconsistent purposes that led to certain compromises." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring in the judgment). Thus, even if Congress considered recordkeeping and tracing requirements as important policy goals of the Gun Control Act, "its Members may differ sharply on the means for effectuating that intent." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). Here, as in other cases involving long-standing, politically divisive issues, searching for better means of achieving a perceived legislative goal "at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.* Accordingly, the Court should reject the government's request to depart from the Gun Control Act's plain text; that plain text reflects precisely what Congress wanted to achieve through these politically controversial laws.

III. THE GOVERNMENT'S OTHER POLICY ARGUMENTS ARE SIMILARLY FLAWED.

The government and its amici also assert a series of other policy arguments in defense of the straw purchaser doctrine. Those arguments are similarly flawed.

First, the government contends that rejecting the straw purchaser doctrine "would mean that an individual could purchase a firearm on behalf of a convicted felon (or otherwise statutorily ineligible individual), falsely deny he was doing so, and not violate Section 922(a)(6)." Resp. Br. 19. This is simply wrong. It is illegal for an individual to sell a gun to someone he knows is a prohibited person. *See* 18 U.S.C. § 922(d).[2] Consequently, a gun dealer cannot sell a gun to someone who plans to resell it to a prohibited person because doing so would be aiding and abetting in the violation of § 922(d). *See* 18 U.S.C. § 2(a). This, in turn, means that falsely denying an intent to sell a gun to a prohibited person affects the legality of the initial sale—that is, it conceals a fact "material to the lawfulness of the sale." Thus, even without the court-created straw purchaser doctrine, the government can continue to prosecute people under § 922(a)(6) for false statements that conceal the intent to buy guns for prohibited persons.

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2. As explained in petitioner's opening brief, Pet. Br. 8-9, Congress added this prohibition to the Gun Control Act in 1986 to "close an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons." H.R. Rep. No. 99-495, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1343. This is devastating to the government's argument because it shows that Congress chose to address this perceived problem in a way other than banning all purchases of firearms on behalf of others—which is the ultimate effect of the court-created straw purchaser rule.

The Brady Center also asserts a series of policy arguments in its amicus brief. First, it contends that "it would be highly unusual for a straw purchaser to determine whether the person to whom he was transferring the gun was prohibited." Brady Ctr. Br. 19. This argument misstates federal gun law. Section 922(d) criminalizes the private sale of firearms if the individual knows or has reasonable cause to believe that the recipient is a prohibited person. 18 U.S.C. § 922(d). Thus, far from being "highly unusual" for private citizens to confirm the person for whom they are buying a gun is not a prohibited person, this is commonplace and expressly anticipated by Congress. Indeed, Congress designed § 922(d) to deter the precise conduct that the Brady Center claims is undeterred absent the court-created straw purchaser doctrine. *See* H.R. Rep. No. 99-495, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1343 (Congress amended § 922(d) in 1986 to "close[] an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons.").

Finally, the Brady Center argues that petitioner's position "would frustrate the intent of Congress by placing the transfer of guns to unlawful purchasers largely beyond regulation." Brady Ctr. Br. 19. Again, this is simply wrong. Section 922(d) already criminalizes the transfer of guns to unlawful purchasers. 18 U.S.C. § 922(d).[3] That

3. The Brady Center opens its brief by recounting a tragic event in New York in which a man killed two firefighters and his sister before taking his own life, all using firearms that a neighbor bought for him. Brady Ctr. Br. 3-4. But the Brady Center omits a key fact noted prominently in the opening paragraphs of a newspaper article it cites to this Court: "Having served time in prison for bludgeoning his grandmother to death with a hammer

provision will remain in full force if the Court rejects the straw purchaser doctrine. Likewise, as explained above, § 922(d) and 18 U.S.C. § 2 criminalize a gun dealer's sale of a firearm to a "straw purchaser" whom the dealer knows will later transfer it to a prohibited person. And the government can assist federally licensed dealers in determining whether a gun buyer intends to transfer the gun to a prohibited person by asking *that* question on Form 4473, instead of the far broader "actual buyer" question it uses now.[4]

In sum, these policy arguments demonstrate that the reason the government and its amici insist upon applying the straw purchaser fiction—rather than relying on the criminal laws Congress actually enacted—is that the straw purchaser doctrine does something *other than* prevent the transfer of guns to prohibited persons. The doctrine criminalizes purchases of firearms on behalf of other *lawful* buyers as well, thus barring anyone from buying a gun for someone else in any circumstance. But as explained above, Congress, in the Gun Control Act and

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30 years earlier, Spengler could not legally buy the guns." David Andreatta & Bennett J. Loudon, *Spengler Was With Greece Woman When She Bought His Guns, Court Papers Allege*, Democrat & Chronicle (Dec. 29, 2012). Thus, even without the court-created straw purchaser doctrine, the neighbor's purchase of those guns for Spengler was illegal. *See* 18 U.S.C. § 922(d).

4. The Brady Center also contends that disapproving the straw purchaser doctrine is "an unacceptable construction of the statutory text" of § 922(a)(6). Brady Ctr. Br. 17. This is a curious argument because—as even one of the government's own amici concedes—the straw purchaser fiction is not found in the statute and is "a judicially created doctrine." New York City Br. 11 (citing *United States v. Dollar*, 25 F. Supp. 2d 1320, 1322 (N.D. Ala. 1998)).

its amendments, made the deliberate policy decision to permit buying a firearm for another lawful gun owner. If the government and its amici want to change that, they must take the issue up with Congress, not this Court.

IV. THE GOVERNMENT IGNORES THE CASE-SPECIFIC NATURE OF MATERIALITY.

The government also disputes petitioner's contention that he prevails on the materiality issue even if the Court applies the straw purchaser doctrine. Resp. Br. 31. The government cites this Court's holding in *Kungys* that a misrepresentation is material if it "was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Id.* The government then argues that "the entire dealer-based regulatory scheme" depends on accurate information about the buyer. Thus, the government asserts, false statements about the "actual buyer" of a firearm always are material.

Kungys demonstrates that this reasoning is flawed. After all, the official decision to naturalize someone as a U.S. citizen necessarily requires accurate information about where that person is from. But this Court held in *Kungys* that a false statement about an applicant's place of birth was not material unless the evidence showed it would have been capable of influencing the naturalization decision *in that case*. Pet. Br. 18-20. Simply put, the materiality analysis under § 922(a)(6) is case-specific; it turns on whether the particular false statement at issue was capable of influencing "the lawfulness of the sale" in that particular case. As explained in petitioner's opening brief, his allegedly false statement is not material under that standard. Pet. Br. 21-22.

The government next argues that, if this Court applies the settled materiality test from *Kungys*, "the government would have to prove the actual purchaser's ineligibility to possess a firearm." Resp. Br. 27. The government contends that in some cases the ultimate recipient of the firearm is unknown and "it would likely be difficult, if not impossible" for the government to obtain a conviction under § 922(a)(6) in that circumstance. *Id.* Of course, courts cannot judicially broaden a criminal law's plain text simply to make prosecutions easier for law enforcement. *Cf. Williams v. United States*, 458 U.S. 279, 286-87 (1982). In any event, the government cites only a single instance in which it could not identify the ultimate recipient of a firearm. Resp. Br. 27. If this problem becomes significant enough to require redress, Congress can step in and resolve it.

The government also argues that, even under the *Kungys* test, petitioner's statement was material because Form 4473 states that a gun dealer cannot sell a gun to someone intending to resell it later. Resp. Br. 31. As explained in petitioner's opening brief, that statement on a government form is not an accurate statement of the law. Pet. Br. 23. In response, the government argues that petitioner waived his right to challenge the legal effect of that statement on the form because he abandoned his APA claim in the court of appeals. Resp. Br. 32-33. This argument fails because the issue has nothing to do with the APA. To be sure, in the district court petitioner challenged the authority of the ATF to include Question 11.a on the form based on APA rules. Pet. App. 8a-9a. And petitioner later chose not to pursue that argument in the court of appeals. Pet. App. 9a. But petitioner asserted in the court of appeals the same claim he asserts here—that

notwithstanding what ATF writes on a form, there is no statute or regulation prohibiting a gun dealer from selling a gun to someone in petitioner's situation. Pet. App. 13a-14a. That argument is not an APA challenge.

In any event, in a critical concession, the government notes that "the ATF statements at issue here are, at most, interpretive rules" based on court precedent, not the text of the Gun Control Act or its accompanying regulations. Resp. Br. 36. This is fatal to the government's argument because interpretive rules cannot change what the law is. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172 (2007). Here, even the case law on which ATF based its "interpretive rule" permits petitioner and others like him to buy guns on behalf of other *lawful* buyers. Pet. Br. 7-8. Based on this precedent, ATF long acknowledged that "straw purchases" among lawful buyers were permissible. Pet. Br. 7-8. That interpretation persisted through six presidential administrations, from 1968 until 1995. When ATF altered its own interpretation in 1995, it was not based on any change in the case law; instead, it was done to accomplish an ATF policy goal not shared by Congress—prohibiting individuals from buying guns on behalf of other lawful buyers. In sum, ATF's statement in Question 11.a is not a valid "interpretive rule" and, even if it were, that statement conflicts with the text of the statute and thus does not have the force of law.

Finally, the government also asserts that, even if ATF's statement in Question 11.a does not have the force of law, that fact is no defense because "[o]ne who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the

requirement itself." Resp. Br. 34 (citing *United States v. Knox*, 396 U.S. 77, 79 (1969)). This argument might work if § 922(a)(6) criminalized all material false statements on the form. It does not. Instead, § 922(a)(6) criminalizes only false statements "material *to the lawfulness* of the sale." *Id.* (emphasis added). Thus, whether ATF's statement has the force of law is a dispositive inquiry because there is no statute or regulation that creates a similar prohibition. Pet. Br. 24-26.

V. THE GOVERNMENT'S INTERPRETATION OF § 924(a)(1)(A) CONFLICTS WITH THE PLAIN LANGUAGE.

The government responds to petitioner's § 924(a)(1)(A) argument by asserting that, because § 923(g)(1)(A) requires gun dealers to maintain records of gun sales "for such period, and in such form, as the Attorney General may by regulations prescribe," the government is allowed to ask whatever it wants on Form 4473. Resp. Br. 37. And the government then asserts that "all the information required by the ATF Form 4473 is information required to be kept for purposes of Section 924(a)(1)(A)." *Id.*

This argument does not withstand scrutiny. Under the government's view of the Gun Control Act, it could ask what color socks gun buyers are wearing, or what their favorite color is, and then prosecute false statements about that information under § 924(a)(1)(A). On the contrary, Congress used the words "required *by this chapter* to be kept" specifically to limit the type of information that could be the basis for a § 924(a)(1)(A) prosecution. Indeed, as the government points out, there is no materiality requirement in § 924(a)(1)(A). Resp. Br. 36.

Congress chose not to include a materiality requirement because it believed that false statements about certain information on these federal forms was so damaging that no materiality analysis was necessary. *Compare* 18 U.S.C. § 924(a)(1)(A) *with* 18 U.S.C. § 922(a)(6). And Congress identified precisely what information that was: the "name, age, and place of residence" of the person acquiring the gun from the dealer. 18 U.S.C. § 922(b)(5). For all other information on the form—including ATF's "actual buyer" information about the ultimate recipient of the firearm—false statements are governed by § 922(a)(6) and its materiality requirement. Here, petitioner did not make a false statement about his own name, age, or place of residence and thus did not violate the provisions of § 924(a)(1)(A), even if this Court applies the straw purchaser doctrine.

* * *

In sum, the government does not hide its reason for seeking to criminalize the conduct of petitioner and other well-intentioned gun buyers like him—it wants to prevent people from buying guns for other law-abiding gun owners. But Congress made the intentional policy decision to permit that conduct. This Court should remain faithful to that unambiguous statutory language and reverse the decision of the court of appeals.

CONCLUSION

For the foregoing reasons, the Court should reverse the court of appeals and remand this case for dismissal of the indictment.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE BRADY CENTER TO PREVENT GUN VIOLENCE, THE MAJOR CITIES CHIEFS ASSOCIATION, AND THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous *amicus* briefs in cases before this Court involving the interpretation and application of firearms regulations, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady Center brief), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). The Brady Center's Legal Action Project has studied and published reports bearing on the dangers posed by straw purchasing, and represents people who have been injured by, or lost loved ones to, straw-purchased guns. The Brady Center brings a broad and deep perspective to the issues raised by this case.

The Major Cities Chiefs Association is composed of police executives heading the fifty-six largest police departments in the United States, including Atlanta, Chicago, Dallas, Detroit, Los Angeles, New York, Philadelphia, Washington, D.C.,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

and many others, which protect roughly forty percent of America's population. The Association has filed amicus briefs in numerous cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), and *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

The International Brotherhood of Police Officers ("IBPO") is one of the largest police unions in the country, representing a significant number of members across the nation. While the IBPO fully supports and defends the Second Amendment right to keep and bear arms, it strongly supports reasonable federal and state gun laws that protect the public and law enforcement officers.

INTRODUCTION AND SUMMARY OF ARGUMENT

On December 24, 2012, before the crack of dawn in Webster, New York, William H. Spengler set his house and car on fire. Firefighters rushed to the scene and prepared to quench the blaze, unaware that Spengler had armed himself with a revolver, a Mossberg 12-gauge shotgun, and a .223-caliber Bushmaster semiautomatic rifle. As Police Chief Gerald L. Pickering would later recount: "He was equipped to go to war to kill innocent people." Setting the fire, it turned out, was a trap, and when the firefighters arrived, Spengler ambushed them from his porch. In the end, Spengler burned down seven homes, damaged two others, severely wounded two firefighters, and killed four people—43-year-old firefighter Michael Chiapperini, 19-year-old firefighter Tomasz Kaczowka, himself, and his sister, whose charred body was found inside the home.[2]

As federal authorities have alleged, this tragedy was made possible after Dawn Nguyen purchased a Mossberg 12-gauge shotgun and a .223-

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[2] *See generally* Liz Robbins & Joseph Goldstein, *Gunman Who Killed 2 Firefighters Left Chilling Note*, N.Y. Times (Dec. 25, 2012); Victoria E. Freile, *Human Remains, Chilling Note Found at Webster Crime Scene*, Democrat & Chronicle (Dec. 25, 2012); George M. Walsh & Mary Esch, *William Spengler's Note Before Killing Webster Firefighters: Do What I Like Doing Best, Killing People*, Huffington Post (Dec. 25, 2012).

caliber Bushmaster semiautomatic rifle from Gander Mountain, a federally licensed firearms dealer in western New York, in June 2010. The federal indictment asserts that Nguyen was not purchasing the firearms for herself, but was instead making a "straw purchase." That is, Nguyen is alleged to have knowingly made a false statement material to the lawfulness of the sale when she represented that she was the actual buyer of the firearms; in fact, she was purchasing the firearms on behalf of her next-door neighbor, William H. Spengler. *See* Indictment, *United States v. Nguyen*, No. 6:13-cr-6044 (W.D.N.Y. Mar. 14, 2013) (alleging violation of 18 U.S.C. § 922(a)(6)).[3] In other words, a straw purchase—a seemingly innocent neighborly gesture—may have set the Christmas Eve tragedy in motion.

Congress has sought to address the dangers posed by straw purchases. As part of its carefully crafted system of regulating firearm sales, Congress requires federally licensed firearms dealers to subject all prospective firearms purchasers to an instant background check. This process is an integral part of Congress' efforts to clamp down on gun trafficking, maintain records of gun transactions, and ensure that firearms are not channeled into the hands of unlawful recipients.

The federally required background check, however, can only verify the eligibility of the person

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[3] *See also* David Andreatta & Bennett J. Loudon, *Spengler Was With Greece Woman When She Bought His Guns, Court Papers Allege*, Democrat & Chronicle (Dec. 29, 2012).

standing before the firearms dealer. The use of a "straw purchaser"—a sham buyer who obtains the gun with the sole purpose of transferring it to another—frustrates the intent of Congress and nullifies the purpose of the background check. The courts have long recognized that straw purchasers are not immune under the statute. By reading the statute in light of established common law rules governing the principal and agent relationship, courts across the country have concluded that an agent who acts on behalf of an unseen principal may not lawfully represent himself to be the actual buyer of the firearm. Instead, these courts have preserved the integrity of the background check system by requiring that the person who submits to the background check must be the true purchaser of the weapon.

Petitioner and his supporting amici put forward an interpretation of the statute that would eliminate the clear rule barring straw purchases, and would replace it with one that is both more complex and less effective. In doing so, petitioner ignores the statutory language and basic common law principles. Moreover, petitioner's proffered interpretation would cripple Congress' carefully considered background check system, embolden gun traffickers, hamper efforts by firearms dealers to keep guns out of the hands of ineligible persons, and confuse lawful gun purchasers.

The prohibition against straw purchases remains necessary to prevent gun violence. The number of persons killed or injured by guns in the United States is staggering. In 2011-12 (the latest

years for which data are available), more than 30,000 people were murdered, committed suicide, or were killed in gun accidents, and more than 80,000 individuals were injured by guns. Moreover, government studies have shown that a large percentage of the firearms used in the commission of crimes in the United States are traceable to straw purchases.

The gun industry itself acknowledges that a significant percentage of the firearms used in crimes are obtained through straw purchases. The industry therefore recognizes the importance of the NICS background-check system and the need for prospective firearm purchasers to provide accurate and truthful information so as to curb the unlawful acquisition of guns by criminals.

In addition, numerous government reports have shown that straw purchases of firearms fuel the illegal international trafficking of weapons. For example, many firearms involved in shoot-outs between Mexican drug cartel members and Mexican law enforcement officials have been traced to straw purchases in the United States. Mexican authorities regard firearms trafficking as the number one threat to that country's security.

In sum, the straw purchaser rule is essential to ensure that the NICS background check verifies the eligibility of the true purchaser of the firearm, and it provides an important safeguard to protect individuals and communities from gun violence.

ARGUMENT

I. Under the Federal Statutory Scheme, Prospective Firearms Purchasers Must Identify Themselves So That An Accurate Background Check Can Be Performed

A. The Basic Operation of the National Instant Background Check System ("NICS")

Congress has long had a role in regulating the possession and transfer of firearms in the United States. *See., e.g., Huddleston v. United States*, 415 U.S. 814, 824 (1974) (noting Congress's "concern[] with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest"). In the Gun Control Act of 1968, Congress made it unlawful for certain individuals, including convicted felons, fugitives from justice, and illegal aliens, to purchase firearms from federally licensed firearms dealers. *See* Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220 (codified as amended at 18 U.S.C. § 922(d)). However, unless background checks are performed on prospective purchasers, prohibited persons could "lie and buy" simply by falsely stating that they were not prohibited from buying a gun. Twenty years ago, Congress began to close this loophole through the Brady Handgun Violence Prevention Act of 1993 (the "Brady Act"), which directed the Attorney General to establish a "national instant criminal background check system," known as the NICS, to search the

backgrounds of prospective gun purchasers for criminal records or other information that would disqualify them from possessing firearms. *See* Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1536 (codified as amended at 18 U.S.C. § 922(f)).

The NICS is a computerized system, operated by the FBI, that searches for disqualifying information in three separate databases: (1) the "NICS Index," containing records on individuals known to be disqualified from possessing firearms under federal law; (2) the "National Crime Information Center," containing records on protective orders, deported felons, and fugitives from justice; and (3) the "Interstate Identification Index," containing criminal history records. 28 C.F.R. § 25.6(c)(1)(iii).

Before completing a sale, a firearms dealer—also known as a federal firearms licensee or "FFL"—must submit the prospective purchaser's name, sex, race, date of birth, and state of residence to the NICS operations center at the FBI. *Id.* § 25.7(a). If the FFL is located in a state that has elected to serve as a "point of contact" for NICS queries, the dealer must submit the inquiry to the relevant state agency. *Id.* § 25.6(d). Upon receiving such an inquiry, the FBI or state agency must immediately provide the gun dealer with one of three responses: (1) "proceed," if no information in the system indicates that a firearm transfer would be unlawful; (2) "denied," if the prospective purchaser may not legally possess a firearm; or (3) "delayed," if further inquiry is necessary. *Id.* § 25.6(c)(1)(iv).

The FFL may not proceed with a firearm transaction unless it first submits the prospective purchaser's identifying information to the NICS. 18 U.S.C. § 922(t). If the FFL learns through the NICS that the prospective purchaser may not legally possess a firearm, the FFL may not transfer the firearm to that person. *Id.* § 922(d).

The NICS represents the primary means by which the federal government ensures and regulates transfers of firearms to lawful purchasers through an FFL. *See Huddleston*, 415 U.S. at 825 ("[I]t is apparent that the focus of the federal scheme is the federally licensed firearms dealer."). Therefore, it is essential that the FFL receive complete and accurate information about the prospective purchaser. To accomplish that objective, Congress enacted the two provisions at issue in this case: 18 U.S.C. § 922(a)(6), which criminalizes giving a false statement to an FFL that is material to the lawfulness of the firearm sale, and 18 U.S.C. § 924(a)(1)(A), which criminalizes making a false statement in providing information that an FFL is required to keep in connection with each firearm sale.[4]

Together, these statutes underscore the high priority Congress placed on ensuring that the name and other identifying information that are run through the NICS background check accurately reflect the identity of the actual buyer of the firearm.

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[4] The information that must be kept by a firearms dealer includes the name, age and place of residence of the firearm transferee. 18 U.S.C. § 922(b)(5).

If a buyer could simply provide a false name, or if the buyer could designate an agent whose name would be provided (instead of the actual buyer's name), the purpose of the NICS system would be undermined. *See United States v. Nelson*, 221 F.3d 1206, 1209 (11th Cir. 2000) (observing that "the statutory scheme would be too easily defeated" if buyers could use a straw purchaser in lieu of providing accurate information). The rule against straw purchases applies well-known common law agency principles to effectuate Congress' intent that FFLs obtain accurate information about gun buyers.

B. The Statutory Scheme Assumes That Actual Purchasers of Firearms Will Be Subjected to Background Checks

When it enacted the Brady Act, Congress understood that the best time to ensure that only lawful purchasers are in possession of firearms is at the point of sale. The NICS was designed to balance the desire of gun buyers to minimize the delay between purchase and possession with the government's need to prevent guns from being unlawfully transferred, by "enabl[ing] licensed firearms transferors to determine instantly whether a proposed transfer would be a prohibited one." H.R. Rep. No. 103-344 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1988. To accomplish this goal, the system requires that the purchaser of the firearm present himself to the firearms dealer so that the purchaser's identifying information can be submitted to the NICS for a background check.

The NICS is designed to verify the eligibility of the person standing in front of the gun dealer; it cannot verify the eligibility of an absent and unknown principal. A straw purchaser, for his part, often will not know whether or not the intended transferee is a lawful purchaser. (Indeed, the Brady Act no longer allows licensed dealers to accept even the sworn statements of purchasers that they are not prohibited; their records must be checked to determine if they can legally buy.) For this reason, the statutory scheme can function properly only when the firearm purchase is made, not by an agent, but by the actual purchaser, whose identifying information can be submitted for the required NICS background check.

Apart from preventing prohibited individuals from directly purchasing firearms, the background check requirement serves several other important law enforcement objectives. Even where the true buyer is a non-prohibited person, the use of a straw purchaser who falsely represents himself to be the actual buyer frustrates other safeguards built into the gun laws. For example, to protect against gun trafficking, FFLs are required to report to the ATF when a purchaser buys multiple handguns at once or within a five-day period. 18 U.S.C. § 923(g)(3). If gun traffickers could use a network of straw purchasers, however, they could circumvent this important statutory safeguard. Moreover, in many cases the sales record kept by the FFL (typically the ATF Form 4473) is the only permanent record of a firearm transfer. In the event of a criminal investigation, it is vital that those records accurately reflect the identity of the actual firearm purchaser.

The facts of one decision petitioner cites in support of his position vividly illustrate why Congress required that actual buyers of firearms present themselves in person before the FFL to purchase those weapons. In *United States v. Polk*, 118 F.3d 286 (5th Cir. 1997), the court vacated an aiding and abetting conviction under § 922(a)(6) in part because Polk could have lawfully purchased the firearms himself. Though Polk was not a "prohibited person," the reason he used a straw purchaser was that he was accumulating an arsenal of weapons in preparation for a "massive offensive" against the federal government, centered around blowing up several IRS buildings. *Polk*, 118 F.3d at 289-90. It is clear why, despite being "eligible" to purchase the guns himself, Polk did not wish to have his name associated with the transaction; it is equally clear why it is imperative, for legitimate law enforcement purposes, that the purchasing documents accurately reflect the gun buyer's true identity.

Fortunately, the straw purchaser in *Polk* was a confidential informant, and the government was therefore aware of the underlying criminal conspiracy. In many cases, however, the purchase records will be the primary or even the sole resource available to investigators seeking to identify the owner of firearms used in criminal activity. The importance of maintaining complete and accurate records of such information does not dissipate merely because the actual purchaser may be lawfully entitled to purchase the weapons. Indeed, the statutory scheme is premised on lawful buyers submitting themselves to background checks.

II. The Straw Purchaser Rule Derives From the Plain Language of 18 U.S.C. § 922

A. The Actual Buyer of the Firearm Is the Firearm's "Transferee"

Petitioner and his supporting amici object to the straw purchaser rule, contending that there are no statutory grounds for inquiring into the "actual buyer" of the firearm. *See* Pet. Br. at 30-31; Stockman Br. at 11. They contend that the statute speaks only of a "transferee," which they assert refers only to the person who happens to be standing before the FFL—regardless of whether that person is purchasing the weapon for himself or on behalf of another. In 1982, the Sixth Circuit described this contention as "novel, although specious." *United States v. Lawrence*, 680 F.2d 1126, 1127 (6th Cir. 1982) (per curiam). More than thirty years later, this same contention remains without merit.

The term "transferee" is not defined in the statute. *See* 18 U.S.C. § 921(a) (defining terms). In interpreting the meaning of undefined statutory terms, courts follow the interpretative canon that "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980). *See also United States v. Morrissette*, 342 U.S. 246, 258-59 (1952) (noting the general incorporation of common law mens rea requirements even where they were not written into the statute).

The term "transferee" is properly understood in light of the common law rule of principal and agent liability, one of the oldest principles in the law. The Latin term is "Qui facit per alium facit per se," or "He who acts through another acts himself," *United States v. Moore*, 109 F.3d 1456, 1461 (9th Cir. 1997) (en banc), and "the English law has recognized that maxim as far back as it is worth while to follow it." Oliver Wendell Holmes, *Agency*, 4 Harv. L. Rev. 345, 347 (1891). "[W]ithin the scope of the agency, principal and agent are one." *Id.* at 345.

Thus, "transferee," as used in the statute, incorporates well established common law agency principles. Viewed from the perspective of the common law, the straw purchaser rule is not mysterious or even particularly remarkable. Section 922 requires certain truthful statements from the "transferee" regarding his identity, to facilitate a NICS background check. Section 922(b)(5) similarly requires that the FFL maintain records about the name, age, and place of residence of the transferee. When a principal uses an agent to effectuate a gun purchase, the principal *is* the transferee under common law agency principles—the straw purchaser is merely a vehicle through which the transaction is accomplished. *See United States v. Soto*, 539 F.3d 191, 198-99 (3d Cir. 2008); *Nelson*, 221 F.3d at 1209. Hence, incorporation of common law agency principles into the statutory scheme supports the common-sense understanding that the principal—the true gun buyer—is the person subject to regulation under § 922 and it is his name that must be provided to the FFL.

B. A Purchaser's Identity Is Always Material to the Lawfulness of the Sale

Section 922(a)(6) prohibits a gun buyer from "knowingly [making] a false or fictitious oral or written statement . . . intended or likely to deceive" a gun dealer "with respect to any fact material to the lawfulness of the sale." Petitioner argues that the straw purchaser rule should apply only *after* the transaction has been completed, if and when it turns out that the true buyer is ineligible to purchase the firearm. As the court below correctly observed, however, the identity of the purchaser is "a constant that is always material to the lawfulness of the purchase of a firearm." *United States v. Abramski*, 706 F.3d 307, 316 (4th Cir. 2013) (quoting *United States v. Frazier*, 605 F.3d 1271, 1280 (11th Cir. 2010)).

"The federal courts have long displayed a quite uniform understanding of the 'materiality' concept as embodied in [criminal false statement] statutes. . . . The most common formulation of that understanding is that a concealment or misrepresentation is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted).

In the context of § 922(a)(6), the "decisionmaking body" in question is the FFL, together with FBI or state agency operating the NICS in the FFL's state. Any false statement

"capable of influencing" the results of the NICS query is a "material" falsehood. As described above, the background-check system established by the Brady Act requires FFLs to submit the transferee's identifying information to the NICS before consummating a sale, 18 U.S.C. § 922(t), and if the NICS informs the FFL that the prospective purchaser is legally prohibited from possessing a firearm, the FFL may not proceed with the transaction, *id.* § 922(d).

An FFL's decision to proceed with a sale hinges on the background check result it receives from the NICS, which in turn hinges on the identifying information submitted by the purchaser to the FFL. *See United States v. Klais*, 68 F.3d 1282, 1283 (11th Cir. 1995) (noting that a fact material to the lawfulness of the sale of a firearm is one upon which the lawfulness of the sale "can hinge"). Any false information that could impair the integrity and accuracy of the NICS background check is thus "material to the lawfulness of the sale" of the firearm because it is "capable of influencing" the outcome of the NICS query. *Kungys*, 485 U.S. at 770.

Petitioner contends that if, in an individual case, the NICS would not return negative background-check results for either the straw purchaser or the actual buyer, then the false identifying information cannot be material. On the contrary, the proper standard for materiality is not whether the false statement actually altered the outcome of the NICS query, but rather whether it had "a natural tendency to influence or was capable of influencing" the outcome. *Kungys*, 485 U.S. at

770. This Court has consistently adopted this standard in the context of other false statement statutes. *See, e.g., Neder v. United States*, 527 U.S. 1, 16 (1999) (false statements on tax returns). A false statement that the straw purchaser is the actual buyer is certainly "capable of influencing" the outcome of a particular background check. Such a false statement is therefore unquestionably "material" within the meaning of § 922(a)(6).

C. The Straw Purchaser Rule Provides Clear Guidance and Avoids Unacceptable Constructions of the Statutory Text

If a person falsely holds himself out as the true purchaser of a firearm when in reality he is acting as an agent for another, that person is frustrating the purpose behind § 922. Petitioner and his supporting amici give several examples of seemingly innocuous conduct that would be prohibited by the straw purchaser rule; they point to the heightened convenience to the true purchaser of using an agent, or to the possibility of receiving a price discount through the agent. Br. of West Virginia, at 5. But, as the facts of the *Polk* case demonstrate, there also are decidedly less innocent reasons (such as planning to carry out a large-scale violent crime spree) why a non-prohibited person would prefer to use a straw purchaser.

Regardless, any mild inconvenience that might result from requiring the actual firearm purchaser to visit an FFL in person and submit to a background check is clearly dwarfed by the

important federal interest in obtaining complete, accurate, and relevant information for performing the NICS check. The straw purchaser rule, as implemented by question 11a on the ATF form, places gun buyers on clear notice that the actual purchaser of the gun must undergo a background check and cannot rely on an agent. In contrast, the interpretation favored by petitioner would render § 922(a)(6) meaningless.

Section 922(a)(6) criminalizes "knowingly" making "any false or fictitious oral or written statement" about a fact "material" to the lawfulness of the gun sale. The statute thus contains a mens rea term along with two separate elements: the statement must be "false", and the statement must be "material" to the lawfulness of the firearms sale. When a statute contains multiple elements but only a single mens rea term, courts must decide whether the mens rea applies only to the immediately proximate element (here, a false or fictitious statement) or to each element of the offense. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) Either option, when coupled with petitioner's flawed interpretation of "material," leads to an absurd interpretation of § 922.

A reading of § 922 that would require the government to show not only that the straw purchaser knew he was making a false statement (*i.e.*, that he was the actual buyer), but also that the straw purchaser knew that the actual buyer was not lawfully entitled to purchase a firearm, would eviscerate the statute. Under this reading, so long as gun traffickers engaging in straw purchases

maintain a studious ignorance as to whether their clients are lawfully entitled to purchase firearms, they would remain immune from prosecution. *See, e.g.*, *United States v. Ortiz*, 318 F.3d 1030 (11th Cir. 2003) (per curiam) (no evidence in the appellate record that the straw buyer, a gun trafficker, knew his clients were unlawful purchasers); *United States v. Stewart*, No. 05-CR-216, 2006 U.S. Dist. LEXIS 1878, at *5 (E.D. Wisc. Jan. 11, 2006) (straw purchaser denied knowing that the true buyer, her boyfriend, had a prior felony conviction). Indeed, it would be highly unusual for a straw purchaser to determine whether the person to whom he was transferring a gun was prohibited. And, even if a straw purchaser wished to supply firearms only to lawful owners, without a NICS check it would be very difficult to determine whether a transferee was or was not, in fact, prohibited.

In short, this reading of the statute would frustrate the intent of Congress by placing the transfer of guns to unlawful purchasers largely beyond regulation. Gun traffickers who do not "know" that their clientele consist of unlawful purchasers could operate with impunity under the statute. Moreover, this reading would also insulate from liability straw purchasers supplying firearms to non-prohibited persons who seek to evade being "tied to the gun" because they intend to use the gun to commit criminal acts, such as the defendant in *Polk*, or even a would-be hit man.

Alternatively, § 922(a)(6) could be read to apply whenever a straw purchaser knowingly made a false statement (that he was the actual buyer) and it

turned out that the true buyer was ineligible—regardless of whether the straw purchaser knew that the true buyer was not lawfully entitled to purchase the firearm. The knowledge requirement would apply only to the first statutory element (the false statement that the straw purchaser was the actual buyer); the straw purchaser would be strictly liable whenever the true buyer happened to be ineligible. *See Flores-Figueroa v. United States*, 556 U.S. 646, 660 (2009) (Alito, J., concurring). The purchase of a gun is an activity that a "reasonable person should know is subject to stringent public regulation," *Liparota v. United States*, 471 U.S. 419, 433 (1985); *United States v. Collins*, 949 F.2d 1029, 1031 (8th Cir. 1991), and in such contexts courts have been willing to impose strict liability on certain statutory elements. But under this reading, § 922 would become a trap: it would hold out the promise that a person could freely buy a gun as an agent for another, but it would impose criminal liability if—unknown to the straw purchaser—the transferee was prohibited from purchasing a firearm (for instance, if the true recipient had an undisclosed felony conviction).

In contrast to petitioner's strained interpretation of the statute, which leads to unacceptable results not contemplated by Congress, the ATF's simple requirement that the person receiving the NICS background check be the actual recipient of the gun being purchased is workable and is consistent with the statutory scheme. Every buyer

is informed at the outset that (unless his intent is to give the gun as a gift[5]) he must be the "actual buyer" of the gun, and that if he is "acquiring the firearm(s) on behalf of another person" then he is not the "actual buyer." ATF Form 4473, question 11a. This approach provides a clear guideline as to conduct that would subject a person to criminal liability, it guards against straw purchases by gun traffickers, and it ensures that the NICS background check verifies that the actual buyer of the gun is eligible to purchase it.[6]

III. Prohibiting Straw Purchases Is Necessary to Prevent Gun Violence

A. The Straw Purchaser Rule Keeps Guns Out of the Hands of Criminals

Congress enacted the Brady Act "to prevent convicted felons and other persons who are barred by

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[5] There is no merit to the argument by petitioner and his supporting amici that the ATF's exception for gifts renders the straw purchaser rule arbitrary. A gift-giver is not the "agent" of the gift-recipient when he purchases the product. Indeed, the intended recipient may not even know about the gift until he receives it, which could be long after it has been purchased. Further, in weighing the burden placed on lawful purchasers against the need to ensure that guns stay out of the hands of those not entitled to possess them, the ATF reasonably could have assumed that gun traffickers do not operate on a not-for-profit basis (*i.e.*, they are not in the business of giving gifts).

[6] This approach also renders moot the mens rea problem posed by petitioner's interpretation, because after reading and answering question 11a on ATF Form 4473, any purchaser would necessarily know that a false statement that he is the true purchaser of the firearm is a "material" false statement.

law from purchasing guns from licensed gun dealers, manufacturers or importers." H.R. Rep. No. 103-344 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1984. Congress implemented the background-check system to help combat what it called "an epidemic of gun violence" in the United States, evidenced by the alarming prevalence of gun murders—15,377 Americans were murdered with firearms in 1992—as well as robberies, assaults, and rapes carried out with the assistance of firearms. *Id.*

The Brady Act and numerous other law enforcement initiatives have achieved some success in reducing the rates of violent crime involving firearms, but gun crime in the United States remains tragically high. In 2011, the last year for which data are available, there were 11,101 firearm homicides. *See* Donna L. Hovert & Jiaquan Xu, *Deaths: Preliminary Data for 2011 - Selected Causes*, National Vital Statistics Reports, U.S. Dep't of Health & Human Servs. (2012). Averaged over the whole year, approximately 30 Americans were killed by a gun *every day* in 2011—and this number does not include firearm suicides, accidental gun deaths, or injuries involving guns. In 2011, 19,766 individuals committed suicide with a gun, and 851 were killed in gun accidents. *Id.* In 2012, 81,396 people were injured by guns. *See Nonfatal Injury Report*, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (2012). All told, approximately 311 Americans are killed or injured by guns during every single day of the year.

The total number of firearms in the United States—possessed both lawfully and unlawfully—has been estimated at approximately 310,000,000. *See* William J. Krouse, *How Many Guns Are in the United States?*, Congressional Research Service (2012). Even with all these firearms in circulation, evidence collected by the ATF indicates that persons with criminal intent frequently obtain guns supplied by dealers—often new guns—and straw purchasing is a commonly used, and perhaps the most widely used, method for the unlawful acquisition of firearms. The ATF collects information on the channels through which firearms are trafficked or unlawfully transferred. The agency has found that straw purchases account for "nearly 50 percent of the trafficking investigations" that the agency conducts, "by far the largest number of trafficking investigations" for any single illicit distribution channel. *See Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, Bureau of Alcohol, Tobacco & Firearms (June 2000).

As then-ATF Director Bradley A. Buckles noted, "Virtually every crime gun in the United States starts off as a legal firearm." *Id.* Based on the percentage of ATF gun trafficking investigations involving straw purchasers, more of these legal firearms are diverted from lawful commerce by straw purchasers than through any other method.

During a comprehensive study of gun trafficking channels in the late 1990s, the ATF found that "illegally diverted firearms associated with straw purchasers represent[ed] nearly a third of the illegally diverted firearms in all ATF investigations

initiated between July 1996 and August 1998." *Id.* at 18. During this period, some 26,000 illegally diverted firearms were associated with straw purchasers. *Id.*

There is no reason to think that the heavy reliance by gun traffickers on straw purchasers to assist them in acquiring firearms has abated since the 1990s. On the contrary, a survey of firearms dealers published in early 2013 demonstrates that straw purchasing remains one of the primary avenues by which criminals divert firearms from the lawful stream of commerce. According to the study, FFLs experienced approximately 34,000 attempted straw purchases during the year preceding the study. *See* Garen J. Wintemute, *Frequency of and Responses To Illegal Activity Related To Commerce In Firearms: Findings From The Firearms Licensee Survey*, 19 Inj. Prev. 369 (2013). It is important to note that this number represents a mere fraction of actual straw purchases, as it reflects only those transactions in which the FFL became aware of an attempted straw purchase, not those in which the straw purchase was unreported and completed successfully.

As an empirical matter, therefore, the straw purchaser rule is an important public safety measure. Indeed, straw-purchased firearms are too often a catalyst for devastating and tragic shootings. It is well known that friends of Eric Harris and Dylan Klebold, the perpetrators of the Columbine High School massacre, purchased weapons on their behalf. *See* David Olinger, *Following the Guns*, The Denver Post (Aug. 1, 1999). As described above (at p.

3), William H. Spengler went to "war" against firefighters on Christmas Eve 2012 with an arsenal of allegedly straw-purchased weapons. In May 2010, a straw-purchased Smith & Wesson .45-caliber handgun killed Thomas Wortham IV, an off-duty Chicago policeman and Iraq war veteran. *See* Frank Main, *The Straw Purchasers: Don't Let This Happen to You*, The Chicago Sun-Times (Aug. 27, 2012) ("In recent years, Chicago Police officers and young children have been among those shot to death with weapons supplied by straw buyers.").[7] And just two months ago, federal prosecutors secured a guilty plea from an individual whose straw purchase "led directly to the murder[s]" of Nate Leon—"an innocent pizza delivery driver" and "a dedicated family man who had the bad luck to be working hard one night"—and Tom Clements, the Executive Director of the Colorado Department of Corrections, who "tirelessly devoted his career to improving the lives of prisoners." *See* U.S. Attorney's Office for the District of Colorado, *Stevie Marie Vigil Pleads Guilty To Purchasing Firearm For Evan Ebel*, Press Release (Oct. 22, 2013), http://www.justice.gov/usao/co/news/2013/oct/10-22b-13.html. These representative examples underscore the importance of the straw purchase rule in

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[7] *See also* Brady Center to Prevent Gun Violence, *Brady Center Files Lawsuit against Gun Dealer, Purchaser, and Trafficker for Family of Thomas Wortham IV, Police Officer and Iraq War Veteran Killed with Straw Purchased Gun*, Press Release (Apr. 24, 2013), http://www.bradycampaign.org/?q=brady-center-files-lawsuit-against-gun-dealer-on-behalf-of-police-officer-shot-with-straw-purchased.

safeguarding individuals and communities from gun violence.

Notably, statistics corroborate the correlation between straw purchasing and violent crime—even when the straw purchase is made on behalf of a family member or a close friend. Although it is tempting to believe that a nephew who purchases a gun on behalf of his uncle—someone he presumably knows, trusts, and loves—is unlikely to be engaging in dangerous or harmful conduct, studies have shown that "the data suggest the opposite":

> In studies of prison inmates, nearly 35% obtained their guns from friends and family members—the largest single source of criminals' guns. Studies also show that many "straw purchases" . . . are made by spouses, girlfriends and other close friends. Personal relationships often make it difficult for someone asked to buy a gun to say no.

See Adam Winkler, *Who Gets a Gun?*, Los Angeles Times (Feb. 15, 2013); *see also* Caroline W. Harlow, *Firearm Use by Offenders*, Bureau of Statistics Special Report, U.S. Dep't of Justice (Nov. 2001) ("The percentage of inmates receiving their gun from family or friends rose from 34% in 1991 to 40% in 1997."); Anthony A. Braga et al., *The Illegal Supply of Firearms*, 29 Crime & Just. 319, 326 (2002) (noting that the "predominant source of guns was a store . . . followed by family members"). Thus, the straw purchaser rule is particularly important to deter the type of purchase made in this case: a

purchase on behalf of a family member, by someone whose loyalty may blind him to the inherent wrongfulness of his conduct.

To illustrate this point, a woman from Canton, Pennsylvania, was recently sentenced in connection with her conviction for straw-purchasing a handgun for her husband. The wife admitted that her late husband repeatedly asked her to purchase a handgun for him because "everyone else could go hunting or target shooting, but he could not." She "finally got tired of listening to him" and purchased the handgun—which the husband used to kill himself and another Canton woman in May 2013. *See* Eric Hrin, *Canton Woman Sentenced in Straw Purchase*, The Daily Review (Dec. 20, 2013).

In 2003, Kansas was the scene of yet another tragic case involving a trusting family member who underestimated the danger of purchasing a gun for a loved one. Imogene Glass was aware that her grandson, Russell Graham, had a temper and a tendency to erupt in violent episodes—most of which were directed at Elizabeth Shirley, the mother of Graham's 8-year old son Zeus. Glass nevertheless agreed to accompany Graham to the Baxter Springs Gun & Pawn Shop to purchase a shotgun, purportedly as a gift for Zeus. *See Shirley v. Glass*, 308 P.3d 1, 3-4 (Kan. 2013).

Glass proceeded to give her own name to the firearms dealer and attested that she was the "actual buyer" of the shotgun on ATF Form 4473. While Glass reportedly knew that Graham had been convicted of attempted rape and kidnapping and was

prohibited from possessing firearms, *id.* at 3, she may have trusted her grandson when he told her that the gun would be kept at her house and that he would not maintain possession of the gun. *Id.*

After Glass purchased the gun in her own name but with Graham's money, Glass drove Graham back to his house, and he took the gun from her car. *Id.* at 4. Later that night, Graham called Shirley and told her that if she did not come over to his house to talk, he would shoot Zeus and himself. Although Shirley left a message saying she was on her way, Graham shot and killed the young boy, and then turned the gun on himself. *Id.*

Horrific episodes like the Kansas case illustrate with extreme clarity the inability of straw purchasers to judge for themselves whether a friend or family member should possess a gun. Congress understood this dynamic when it enacted the Brady Act and established the NICS. Through the background-check system, Congress took the decision about whether a third party should or should not possess a firearm away from straw purchasers—whose judgment may be clouded by close relationships or familial bonds—and gave it to law enforcement agencies and licensed firearms dealers. *See Huddleston*, 415 U.S. at 825. The statutory scheme requires that FFLs (informed by the NICS background check), not elderly grandmothers, be the gatekeepers of firearm possession.

B. The Gun Industry Itself Acknowledges That Straw Purchasing is Illegal and Dangerous, Even If The Ultimate Buyer Is Not Prohibited

The gun industry recognizes that giving accurate and truthful information when purchasing firearms is important to combat the unlawful acquisition of guns by criminals. The prominent "Don't Lie for the Other Guy" education and advertising campaign, a cooperative effort between the ATF and the firearms industry trade association, the National Shooting Sports Foundation, acknowledges that a significant percentage of the firearms obtained by criminals and used in crimes are obtained through straw purchasers. *See Don't Lie for the Other Guy: A National Campaign to Prevent the Illegal "Straw Purchase" of Firearms FAQs*, available at http://www.dontlie.org/faq.cfm.

The same campaign also acknowledges that an unlawful straw purchase occurs whenever the true buyer acts through an agent, even if only to conceal the purchaser's actual identity from the FFL. Thus, the problems associated with straw purchases have been noted even within the gun industry and gun owners' community. *See* National Shooting Sports Foundation, *Don't Lie for the Other Guy: The Firearm Industry's Anti-Straw Purchasing Program Fast Facts*, available at http://www.nssf.org/factsheets/PDF/strawPurchase.pdf (defining a straw purchase as "when the actual buyer of a firearm is unable to pass the required federal background check, *or does not want his or her*

full name associated with the purchase, and has someone else who can pass the required background check purchase the firearm for him or her.") (emphasis added).

Narrowing or eliminating the straw-purchaser rule, as petitioner demands, would also limit the ability of conscientious FFLs to detect and report instances in which guns may be diverted to unlawful possessors. FFLs can often use their considerable professional experience to detect if a buyer is in fact a straw purchaser. What they are less able to do is divine whether the absent true buyer is or is not a lawful purchaser.

This point is illustrated by *United States v. Jackson*, No. 13-cr-129, 2013 U.S. Dist. LEXIS 87858 (E.D. Va. June 20, 2013). In that case, defendant Jackson visited an FFL and asked to buy a Draco 7.62mm AK-47 type pistol. The firearms dealer was "intrigued" by the request, noting that such a weapon is not typically purchased for self-defense and that its substantial recoil would be difficult for Jackson, "a slight woman in her fifties," to manage. *Id.* at *2-3. Upon further discussion, the dealer discovered that Jackson "knew practically nothing about firearms," despite claiming to be a collector, and could not identify the caliber of the weapon she was purchasing or the size of the bullet it fired. *Id.*

Suspecting a straw purchase, the FFL called the ATF and agreed to stall Jackson until agents could arrive at the store. *Id.* at *4. After the purchase was completed, Jackson entered the car of Timothy McLeod, who was waiting in the parking lot. *Id.* at

*6. Officers later observed Jackson attempt to hand the gun over to McLeod. It eventually emerged that McLeod was a five-time convicted felon who was "known as a drug dealer" and who had recently been the subject of a controlled crack cocaine purchase. *United States v. Jackson*, No. 13-cr-129, 2013 U.S. Dist. LEXIS 82352, at *8 (E.D. Va. June 11, 2013) (denying motion to suppress). McLeod had used Jackson as a straw purchaser for firearms at least 15 times before. *Jackson*, 2013 U.S. Dist. LEXIS 87858, at *8.

The FFL in *Jackson* had ample reason to suspect that Jackson was a straw purchaser. Because he knew that "purchasing the firearm for someone else" was "a violation of federal law," he contacted the ATF to report the potentially illegal transaction. *Id.* at *4. But what the FFL did not know, and could not have known, was that the true buyer (McLeod) was a convicted felon. Under petitioner's view, that unknown fact is the difference between a lawful and unlawful sale. Jackson's suspicious behavior only indicated that a straw purchase was being made, but petitioner's entire case rests on the claim that straw purchases, on their own, are not unlawful. Hence, under petitioner's interpretation of § 922, the FFL would not have had any grounds to suspect that a crime was being committed and may not have called the ATF. The result would have been yet another firearm in the hands of a convicted felon.

C. Straw Purchases of Firearms Fuel the Illegal International Trafficking of Weapons

According to a 2009 report from the U.S. Government Accountability Office ("GAO"), 87 percent of firearms that were seized in Mexico and successfully traced had originated in the United States. *See* U.S. Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges*, GAO-09-709, at 3 (June 2009). The unfettered access of Mexican drug cartels to firearms from the United States has "undoubtedly escalated the violence on both sides of the border, which in Mexico has resulted in 50,000 people killed from 2006 until 2011, including over 12,000 in 2011 alone." David H. Pendle, *From Minnesota to Mexicali: Connecting the Dots with Trafficked Firearms*, 40-Dec. Prosecutor 30 (Winter 2011).

Not surprisingly, the GAO has concluded that a primary source of the infusion of American firearms into Mexico is straw purchasing. *See* GAO-09-709 Report, *supra*, at 21; *see also* Evan Perez, *An American Gun in Mexico*, Wall St. J. (May 21, 2011); Guillermo Contreras, *The Buyers: Straw Purchases in the U.S. Profit From Murder in Mexico*, San Antonio Express News (Dec. 14, 2008) ("Crucial to the flow of guns into Mexico, where they are largely illegal, are networks of straw buyers—U.S. citizens with clean criminal backgrounds who are bankrolled by the cartels to shop for guns."); Todd Bensman, *Gunrunners' Land of Plenty*, San Antonio Express News (Nov. 30, 2008) ("The cash-rich cartels pay

handsomely for 'straw buyers' . . . to acquire the lethal firepower from licensed retailers . . . sometimes leaving no paper trail before handing them over to killers.").

In the aftermath of shoot-outs between drug cartel members and Mexican authorities, straw-purchased firearms are routinely recovered from the rubble. *See* Jonathan Lowy, *Exporting Gun Violence: How Our Weak Gun Laws Arm Criminals in Mexico and America*, The Brady Center to Prevent Gun Violence, at 10-13 (Mar. 2009). To illustrate: In February 2007, a violent battle between narcotics traffickers and the local police in Aguascalientes, Mexico left four officers dead. *See* Bensman, San Antonio Express News, *supra*. The officers' "old .38 caliber revolvers" were no match for the powerful weaponry that the cartel gunmen wielded on that "Black Thursday." *Id.* At the scene of the carnage, investigators recovered a straw-purchased Walther G22 assault rifle and a Beretta M9 semi-automatic handgun. *Id.* ATF traced these firearms back to Universal Sporting Goods in Laredo, Texas. *Id.*

In May 2007, armed assailants waged a gun battle in the mining town of Cananea, in northern Mexico. Twenty-three people, including five police officers, were killed. The assailants' arsenal included a semi-automatic Kalashnikov—which had been straw-purchased in a Phoenix gun store one year before what is known as the "*matazon*," or the "big slaughter." *See* Tim Gaynor, *Following a Hit Man's Rifle to Mexico*, Reuters (Mar. 16, 2008).

In March 2008, drug cartel members and Mexican soldiers battled in coastal Ciudad Madero, Tamaulipas. *Id.* After the shootout, the soldiers recovered several firearms, including a Bushmaster .223-caliber assault rifle that had been straw-purchased from Academy Sports and Outdoors in San Antonio, Texas. *See* Contreras, San Antonio Express News, *supra*.

These examples illuminate the connection between straw purchasing in the United States and violent tragedies across our borders. Indeed, even a single American straw purchaser is capable of unleashing an alarming amount of death and destruction in Mexico. In February 2007, for example, four police officers and three government secretaries were killed in the "Acapulco Massacre." John Hernandez, a 25 year-old United States citizen, straw-purchased some of the lethal weaponry that was used that day, including two Bushmaster Model 16M4, .223 caliber semiautomatic assault rifles. *See* Dane Schiller, *Mexican Gangsters Buying Weapons in Houston*, Houston Chronicle (Nov. 30, 2008). Hernandez, in fact, led a straw-purchasing ring, and over the course of a year "paid $24,800 to purchase at least twenty-three firearms that were 'military in style and utility,'" five of which were recovered at crime scenes in Mexico. *United States v. Hernandez*, 633 F.3d 370, 371 (5th Cir. 2011) (affirming conviction under 18 U.S.C. § 922(a)(6)).

The problem of firearms trafficking has grown so dire that Mexico regards it as the "number-one threat to its national security." *See* Pendle, *supra*. At bottom, the danger posed by straw purchasing

should not be underestimated. The practice fuels crime at home and abroad, with devastating consequences.

* * *

Congress enacted the Brady Act to prevent legal firearms from falling into the hands of those who would use them to commit violent acts. Notwithstanding the Act's success in establishing the NICS background-check system, criminals remain able to obtain firearms at a startling rate, and the most prominent way they obtain these firearms is through straw purchases. Far too often, straw purchasing spawns devastating tragedy. Purchasing a firearm on behalf of a neighbor, a grandson, or an uncle may seem innocuous, but the loved ones of countless individuals who have been killed by straw-purchased firearms would surely disagree.

The straw purchaser rule is a critical means of containing the tide of violent crimes in this country committed through firearms. Congress made the policy decision to protect individuals and communities from gun violence by establishing the NICS background-check system to verify the eligibility of persons who seek to purchase firearms from federally licensed gun dealers. As a matter of law, the straw purchaser rule flows from a straightforward application to the statute of noncontroversial agency principles that have been accepted by courts for centuries.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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AMICUS CURIAE BRIEF

No. 12-1493

IN THE

Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE STATES OF HAWAII, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, NEW HAMPSHIRE, NEW YORK, AND OREGON, THE COMMONWEALTH OF MASSACHUSETTS, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether petitioner's statement that he was the actual buyer of a firearm on a Bureau of Alcohol, Tobacco, Firearms and Explosives Form 4473 was a false statement "material to the lawfulness of the sale" under 18 U.S.C. § 922(a)(6), where petitioner purchased the firearm for his uncle and both he and his uncle were eligible to purchase a firearm.

2. Whether the identity of the actual buyer of a firearm is information that is required to be kept in the records of a federal firearms dealer under 18 U.S.C. § 924 (a)(1)(A).

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BRIEF OF THE STATES OF HAWAII, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, NEW HAMPSHIRE, NEW YORK, AND OREGON, THE COMMONWEALTH OF MASSACHUSETTS, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of Hawaii, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New York, Oregon, and the District of Columbia as amici curiae in support of respondent.[1]

INTEREST OF AMICI CURIAE

Amici curiae are States committed to reducing the consequences of gun violence for their citizens. The widespread use of guns in America comes at a high price. Dozens of people are killed with guns every day. Tens of thousands more are injured every year. Amici and their citizens shoulder extraordinary social and monetary costs on account of gun violence, and they have determined that those costs may be reduced through regulatory action. In service of their "strong interest[s]" in "protecting public safety," *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991), and in "effective law enforcement," *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), amici rely on a combination of state and federal laws to reduce the use

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amici or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief. Under Rule 37.4, amici are not required to submit a motion for leave to file this brief.

of guns in crime and to identify the perpetrator when gun crimes are committed.

Federally required background checks prevent guns from getting into the hands of felons, fugitives, and other persons whose possession of firearms would pose a serious danger. Amici—indeed, all States—have an interest in minimizing the use of firearms by dangerous persons. Yet petitioner and his amici advance a construction of federal law that would directly undermine that interest: if felons and other ineligible persons can easily use straw purchases to avoid background checks, they will have greater access to firearms.

Federal law also underpins the States' efforts to enforce their own gun laws. States have adopted a variety of regulatory strategies to tackle the problem of gun violence within their borders. Some States have enlarged the class of prohibited purchasers (to include violent misdemeanants, for example), and expressly forbid straw purchases on behalf of ineligible persons. Some impose waiting periods in order to complete gun purchases, or limit the sale of certain types of firearms, such as assault weapons. States have also variously established handgun safety standards, required gun licenses, required the recording of ballistics information about firearms, or specified how firearms should be stored and where they may be carried. Alone or in combination, these regulatory efforts typically have the effect of reducing freely available firearms for use in crime.

Therein, for purposes of this case, lies the rub: would-be criminals within amici's jurisdictions are driven to go elsewhere to acquire guns. Not all

States have determined that gun violence warrants a strong regulatory response, as the other state amicus brief in this case shows—some States have relatively weak gun laws that do little to independently constrain criminals' access to guns. *See generally* Brief of Amici Curiae State of West Virginia, 25 Other States, and Guam in Support of Petitioner ("W. Va. Br."). Data show that the traffic of guns between States largely flows from so-called "weak regulation" States to "strong regulation" States, very often through straw purchases. Here, federal law is the floor. To limit illegal gun trafficking across their borders, amici depend on federal law regulating gun sales nationwide. If the federal limits on straw purchases are eroded, amici will be hamstrung in their efforts to enforce their own laws which, in amici's considered judgment, reduce gun violence, promote public safety, and support law enforcement. *See United States v. Biswell*, 406 U.S. 311, 315 (1972) ("close scrutiny" of "interstate traffic in firearms" is "undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders" (citing 18 U.S.C. § 922 note)).

Petitioner's state amici argue that the federal statutes at issue here impede their flexibility to respond to gun violence as they see fit. W. Va. Br. 16. Quite the opposite: a weakened federal scheme would force the lowest common denominator on every State, because the reality of interstate gun traffic means that one State's efforts to regulate gun purchases can be neutralized by would-be criminals' unregulated access to guns in neighboring States. Properly construed, § 922(a)(6) and § 924(a)(1)(A)

protect against that outcome by forbidding a gun purchaser to lie about the actual buyer of the gun when asked, whether or not the actual buyer is legally ineligible to make the purchase or wishes to conceal his or her identity. Because the federal false statement prohibitions are indispensable to amici's own efforts to deny prohibited persons access to firearms, combat gun trafficking, and aid law enforcement, amici have a strong interest that these prohibitions be enforced to the full extent of Congress's design.

SUMMARY OF ARGUMENT

States have not responded uniformly to the problem of gun violence. Some, including amici, have implemented detailed, carefully crafted schemes aimed at reducing the availability of guns for use in crime. Others have taken a laxer view, regulating gun sales and possession little, if at all. But *all* States are beneficiaries of the background checks by federally licensed firearms dealers that keep guns out of the hands of felons and other dangerous persons. The safeguards provided by that background check scheme would be gutted if petitioner's construction of the federal gun laws were adopted.

Sections 922(a)(6) and 924(a)(1)(A) forbid a gun purchaser to falsely state the identity of the true buyer when purchasing a gun from a federally licensed dealer, ensuring that the dealer runs a background check on the right person. Petitioner proposes instead that only § 922(d)'s distinct prohibition of knowing transfers to ineligible persons constrains straw purchases, such that a buyer can lie to a dealer about a preexisting arrangement to transfer the

gun to another without violating federal law, so long as the buyer does not know that the actual purchaser is ineligible to possess a firearm. But, as Congress recognized in enacting § 922(a)(6) and § 924(a)(1)(A), it is not enough to rely on a straw purchaser's assessment of the lawfulness of a sale: straw purchasers are often unaware of the actual buyer's criminal record, mental health history, and other disqualifying characteristics. Section 922(d) thus fails to capture many prohibited transfers that only a background check run through law enforcement channels will catch. By requiring the truthful disclosure of the actual buyer's identity at the point of sale, § 922(a)(6) and § 924(a)(1)(A) meaningfully limit straw purchases in a way that preserves the use of background checks to keep firearms away from prohibited persons.

These provisions are also essential to combating illegal interstate gun traffic. The varying state gun-law regimes have predictable real-world consequences: guns flow from weaker-regulation States to stronger-regulation States, where they are used in crime. Countering this interstate crime gun traffic requires regulation at the federal level, as the Congresses that enacted the federal gun laws understood. Indeed, in many States—including many of petitioner's state amici—federal law is the *only* regulatory constraint on sales by federally licensed dealers. When strict local laws drive would-be criminals outside their States to purchase guns, they still must contend with federal regulations requiring the dealer to verify the buyer's identity, confirm the buyer's eligibility to purchase the gun, and record material details about the sale. In this way, the federal laws

help slow the flow of guns to prohibited persons and support law-enforcement efforts to identify guns used in crime.

Even now, straw purchases are frequently used to circumvent the federal requirements. Some straw purchases conceal an actual buyer who is ineligible to possess a gun, of course, but others conceal actual buyers who wish to withhold their identities for other reasons—to obscure a high volume of gun purchases, for example, or to avoid being traced to the gun after it is used in a planned crime. If federal law prohibiting false statements in purchases from federally licensed dealers is rolled back to *permit* a straw purchaser to conceal the true nature of the sale, would-be criminals will be able to acquire and transport untraceable firearms across state lines with relative ease, defeating amici's intrastate efforts to reduce gun violence.

The scope of the federal regulation of firearm sales, including the false-statement prohibitions, is limited: private intrastate sales are unaffected, as are gifts. But giving up the sale-level safeguards of § 922(a)(6) and § 924(a)(1)(A) would significantly undermine the state laws that amici have judged necessary to support law enforcement and promote public safety within their borders. Measured against these important state interests, the reasons advanced by petitioner's amici for leaving straw purchases unregulated are insubstantial. The reasonable regulation of gun sales does not implicate the Second Amendment rights of purchasers who may acquire firearms simply by being truthful. The need to curtail unlawful interstate gun traffic is not outweighed by individual considerations of convenience

or price. And federal limitations on straw purchases do not encumber the differentiated array of state-level regimes.

Prohibiting false statements about the actual identity of a gun buyer limits the opportunity for would-be criminals to evade detection by law enforcement and to circumvent regulations barring certain dangerous persons from owning guns. The federal prohibitions should be left intact.

ARGUMENT

I. GUN TRAFFIC FROM STATES WITH WEAKER GUN LAWS IS A MAJOR LAW ENFORCEMENT CHALLENGE FOR STATES SEEKING TO ENFORCE STRICTER GUN LAWS

A. Interstate Gun Traffic Substantially Consists Of Firearms Flowing From Weaker-Regulation States To Stronger-Regulation States

1. The devastation from gun violence in this country is well documented. In 2011, there were nearly 480,000 gun-related violent crimes nationwide. Garen J. Wintemute, *Frequency of and Responses to Illegal Activity Related to Commerce in Firearms; Findings from the Firearms Licensee Survey*, Injury Prevention, Mar. 11, 2013, at 1. Of these, more than 11,000 were homicides and more than 55,000 were assaults requiring emergency room treatment. *Id.* Between 1993 and 2005, nearly five million Americans were victims of violent crimes committed with firearms. Mayors Against Illegal Guns, *Inside Straw Purchasing: How Criminals Get Guns Illegally* 3 (Apr. 2008) ("Inside Straw Purchas-

ing"). Indeed, since President Kennedy was assassinated fifty years ago, more Americans have been shot and killed on American soil than in all the wars of the twentieth century combined. NGVAC, *Fact Sheet: Illegal Gun Trafficking Arms Criminals & Youth* ("NGVAC Fact Sheet"), *available at* http://gunvictimsaction.org/fact-sheet/fact-sheet-illegal-gun-trafficking-arms-criminals-and-youth.

Straw purchases—where one person buys a gun on behalf of another, undisclosed person—contribute heavily to this intolerable gun violence. *See infra* at 16-22. Guns end up in the hands of criminals notwithstanding laws aimed at keeping firearms away from dangerous persons: the "vast majority" of gun murders and non-fatal shootings "are committed by people who have no legal right to a gun." NGVAC Fact Sheet. The steadfast enforcement of those laws is necessary to reduce gun violence, as the data show. *See* Daniel W. Webster et al., *The Case for Gun Policy Reforms in America* 8 (Oct. 2012), *available at* http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/WhitePaper102512_CGPR.pdf (enforcing ineligibility prohibitions is associated with lower rates of violence).

2. In this action, the United States prosecuted petitioner Bruce Abramski for his role in purchasing a Glock firearm on his uncle's behalf. Petitioner purchased the gun from a federally licensed dealer in Virginia, and falsely answered "Yes" to the following question in ATF Form 4473: "Are you the actual transferee/buyer of the firearm(s) listed on this form?" Petitioner did so even though (a) he had already agreed to purchase the gun for his uncle, (b)

he had already received a check from his uncle to pay for the gun, and (c) ATF Form 4473 expressly stated, in bold type, "**Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person.**" Petitioner then took the gun to Pennsylvania, where he transferred it to his uncle as they had agreed beforehand.

Petitioner's state amici argue that in prosecuting petitioner for his violations of federal law, the United States improperly seeks to regulate private intrastate transfers between eligible purchasers. W. Va. Br. 2. That is obviously not the case. This action does not involve a "private intrastate firearms transfer." *Id.* Petitioner purchased the gun at issue from a federally licensed seller, not from a private individual. He transported it across state lines, from Virginia to Pennsylvania, by prearranged agreement. Moreover, the federal laws at issue here would not have impinged on even a truly *intrastate* private transfer (if petitioner's uncle had also resided in Virginia), if petitioner had bought a gun genuinely for *himself*, and only *later* decided to sell it to his uncle. But federal law does legitimately regulate *straw* purchases from federally licensed dealers as part of a regulatory scheme designed both to help keep guns out of the hands of those not legally entitled to possess them and to assist State law enforcement efforts to combat violent crime. S. Rep. No. 90-1097, at 28 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112.

3. Each State, in the exercise of its police power and subject to constitutional constraints, is free to enact whatever gun control legislation it deems best, including none at all. *See, e.g., Richmond Boro Gun Club, Inc. v. City of New York*, 896 F. Supp. 276, 285

(E.D.N.Y. 1995), *aff'd*, 97 F.3d 681 (2d Cir. 1996). Many States and the District of Columbia have enacted laws aimed at preventing harm to their citizens from guns. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3135 (2010) (Breyer, J., dissenting). Some of those laws prohibit straw purchases of firearms, falsifying purchaser information, or failing to conduct a pre-sale background check. Others require universal background checks on all handgun sales, require permits for handgun purchases, limit concealed carry permits, prohibit gun possession by violent misdemeanants, require owners to report all lost or stolen guns, allow local control of gun regulations, or authorize inspections of gun dealers. *See* Mayors Against Illegal Guns, *Trace the Guns: The Link Between Gun Laws and Interstate Gun Trafficking* 28 (Sept. 2010) ("Trace the Guns").[2]

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[2] States alone regulate some issues. For example, some States and localities stepped in to regulate semi-automatic, military-style weapons after Congress allowed the federal assault weapon ban to expire in 2004. *See, e.g.*, Cal. Penal Code § 30365(a); Conn. Gen. Stat. § 53-202c(a)-(c); D.C. Code § 7-2502.02(a)(6); Haw. Rev. Stat. Ann. § 134-8(a); Iowa Code § 724.29; Md. Code Ann., Crim. Law § 4-303(a); N.J. Stat. Ann. § 2C:39-5f; N.Y. Penal Law §§ 265.02(7), 265.10; *see also* Mass. G.L. c. 140, § 131M (enacted by Mass. St. 1996, c. 180, § 47).

Similarly, federal law does not require a waiting period before completing a firearm purchase, but many States do. *See, e.g.*, Cal. Penal Code §§ 26815(a), 27540(a) (ten days); D.C. Code Ann. § 22-4508 (ten days); Fla. Stat. Ann. § 790.0655(1) (three days for a handgun, excluding weekends and legal holidays); Haw. Rev. Stat. Ann. § 134-2(e) (fourteen days, but waiting period inapplicable to subsequent purchases of long guns during the year following an initial purchase); 720 Ill. Comp. Stat. 5/24-3(A)(g) (three days for handguns, one day for long guns); Iowa Code § 724.20 (three days for a handgun); Md. Code Ann., Pub. Safety §§ 5-123 – 5-125 (seven days for a

Many States have much less regulation. Several of petitioner's state amici, for example, have not enacted any of the foregoing provisions regulating guns.

4. Predictably, the divergent approaches to gun control in the various States produce real interstate consequences. States that regulate guns strictly export crime guns to other States at relatively low rates; conversely, States with lax gun laws export crime guns at much higher rates. *Id.* at 3.

The reason crime guns flow from States with less gun regulation to States with more is simple economics:

> Firearms trafficking is profitable because of the disparity in firearm laws in different jurisdictions. In cities like Washington, Chicago or New York, local statutes heavily restrict handgun acquisition and possession, but violent crime fuels the demand for easily concealable weapons. The basic law of supply and demand takes effect. For a firearms trafficker who is willing to break the law and exploit the criminal demand for firepower, these are "market areas." By contrast, "source areas" are places where guns are plentiful and more easily obtained. In a "source area" there are numerous gun shops and less restrictive state and local laws regarding firearms possession

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handgun); Minn. Stat. § 624.7132, subds. 4, 12. (seven days for handguns and assault weapons); N.J. Stat. Ann. § 2C:58-2a(5)(a) (seven days for a handgun); R.I. Gen. Laws §§ 11-47-35(a)(1), 11-47-35.2 (seven days); Wis. Stat. § 175.35(2)(d) (two days for a handgun).

> and acquisition. Guns purchased in "source areas" can be easily sold on the street in a "market area" for two to three times as much as the trafficker paid for the gun.

Mark Kraft, *Firearms Trafficking 101 or Where Do Crime Guns Come From?*, 50 Project Safe Neighborhoods 6, 6-7 (Jan. 2002), *available at* www.justice.gov/usao/eousa/foia_reading_room/usab5001.pdf ("Firearms Trafficking 101").

The empirical data on interstate gun trafficking confirm what the economic incentives predict. One study found that "[i]n 2009, just ten states supplied nearly half—49%—of the guns that crossed state lines before being recovered in crimes." Trace the Guns 2 (emphasis omitted). And the ten States that export crime guns at the highest rates (most of whom joined petitioner's state amicus brief) do so at more than "seven times the rate of the ten states with the lowest crime gun export rates." *Id.* (emphasis omitted).

Most of these States responsible for the interstate gun trafficking supply—both in sheer numbers and in export rates—have joined the West Virginia Brief, which asserts a theoretical burden on intrastate gun transfers not in issue in this case (because buying guns genuinely for oneself, and *later* deciding to sell, is not affected). In contrast, the amici submitting this brief bear the consequences of the supply of crime guns coming from their weaker-regulating neighbors. The federal law prohibiting false statements about an actual buyer's identity in a firearm sale by a federally licensed dealer combats the un-

lawful gun traffic fed by straw purchases, and it is crucial to amici's law enforcement efforts.

B. Federal Law Is Specifically Concerned With Curbing Gun Traffic From Weak- To Strong-Regulation States

Prosecutions targeting interstate firearms transactions, as this action does, implicate a core purpose of the Gun Control Act of 1968: preventing one State's weaker gun laws from creating extrajurisdictional harm that another State's stricter local laws seek to avoid.

As then-Senator Tydings explained:

> This concealed weapons amendment does not violate any State's right to make its own gun laws. Quite the contrary, title IV provides the controls on interstate gun traffic which only the Federal Government can apply, and without which no State gun law is worth the paper it is written on.... Without such Federal assistance, any State gun law can be subverted by any child, fugitive, or felon who orders a gun by mail or buys one in a neighboring State which has lax gun laws.

Huddleston v. United States, 415 U.S. 814, 832 n.11 (1974) (quoting 114 Cong. Rec. 13,647 (1968)).

Petitioner and his state amici ignore that enforcement of federal law (and particularly the bar against straw purchases) is essential to achieving the interests of States with strong gun laws. It is true that one objective of § 922(a)(6) and § 924(a)(1)(A) is to help "keep firearms out of the hands of those not legally entitled to possess them."

Barrett v. United States, 423 U.S. 212, 220 (1976). As explained, petitioner's construction of the provisions undermines that important objective by helping prohibited persons bypass background checks.

But the federal gun laws have another, equally important purpose: to "assist the States in regulating the firearms traffic within their borders." *Biswell*, 406 U.S. at 315. As the Gun Control Act of 1968 itself recites, Congress broadly sought to "provide support to Federal, State, and local law enforcement officials in their fight against crime and violence." Gun Control Act of 1968, Pub. L. 90-618, § 101, 82 Stat. 1213 (1968). To that end, the Act aimed not only "to aid in making it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency," but also "to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime in the United States." S. Rep. No. 90-1097, at 2.

Congress and the Attorney General both recognized at the time of the Act's passage that one of its critical functions would be to help prevent interstate gun trafficking from subverting State and local gun control laws. As the Senate Report explained:

> The existing Federal controls over interstate and foreign commerce in firearms are not sufficient to enable the States to effectively cope with the firearms traffic within their own borders through the exercise of their police power. Only through adequate Federal control over interstate and foreign commerce in firearms, and over all persons engaging in the

> business of importing, manufacturing, or dealing in firearms, can this problem be dealt with, and effective State and local regulation of the firearms traffic be made possible.

S. Rep. No. 90-1097, at 2.

Likewise, the then-Attorney General testified: "By recognizing the Federal responsibility to control the indiscriminate flow of firearms and ammunition across States borders, this bill will give States and local communities the capacity and the incentive to enforce effectively their own gun control laws." H.R. Rep. No. 90-1577, at 19 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4425.

In enacting the Gun Control Act of 1968, Congress recognized that solely state-level gun regulation is inadequate to protect the interests of States desiring to enforce strong gun control laws as a means of preventing gun violence, and sought to do something about it. Among the most critical nationwide protections Congress provided are those implicated by the violations prosecuted in this case: the requirement that federally licensed firearms dealers conduct background checks on gun purchasers (§ 922(s)), the requirement that such dealers maintain records of firearms sales (§ 923(g)(1)(A)), and the prohibitions of false statements in gun sales (§ 922(a)(6), § 924(a)(1)(A)). If those requirements are not enforced nationally, it will dramatically undermine amici's ability to protect their citizens from gun violence and will permit the gun laws they have enacted to be circumvented, contrary to Congress's expressed intent.

II. FEDERAL LIMITATIONS ON STRAW PURCHASES ARE NECESSARY TO STATES' EFFORTS TO COMBAT GUN VIOLENCE BY LIMITING GUN TRAFFICKING

Data from multiple sources demonstrate that many crime guns travel indirectly but quickly from federally licensed dealers into the hands of criminals. Federal gun laws, including the requirement that the actual buyer be revealed and recorded, provide important and legitimate obstacles to the ability of and incentives for would-be criminals to traffic guns across state borders.

A. Straw Purchases Are One Of The Most Significant Sources Of Guns Used In Crime

1. The Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") traces guns recovered in criminal investigations to the original retail seller and buyer, and also investigates criminal trafficking in firearms. These ATF tracing and trafficking investigations provide a wealth of data on the movement of crime guns. Based on that data, the ATF has concluded that "straw purchasers represent a significant overall crime and public safety problem." Bureau of Alcohol, Tobacco, and Firearms, United States Dep't Of Treasury, *Following The Gun: Enforcing Federal Laws Against Firearms Traffickers* 18 (2000) ("ATF Following the Gun"), *available at* http://www.mayorsagainstillegalguns.org/downloads/pdf/Following_the_Gun%202000.pdf.[3]

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[3] Per the ATF, criminal gun trafficking encompasses "the illegal market supplied by a variety of sources," including unli-

In nearly 9 out of 10 crime gun traces where the gun possessor and purchaser were known, the original purchaser was not the person who used it in the crime. Bureau of Alcohol, Tobacco and Firearms, United States Dep't of Treasury, *Crime Gun Trace Reports (1999)*, at 8 (2000) ("ATF Crime Gun Trace Reports"), *available at* https://www.atf.gov/sites/default/files/assets/pdf-files/ycgii-report-1999-general-findings.pdf.[4] Information obtained from criminals themselves corroborates this ATF finding. A 1997 Bureau of Justice Statistics survey of more than 18,000 state and federal prison inmates found that more than 86% of state inmates who had used a gun in a crime had acquired it from somewhere other than a retail outlet (retail store, pawn-shop, flea market, or gun show). Bureau of Justice Statistics, United States Dep't of Justice, *Firearm Use By Offenders* 6 (2001), *available at* http://www.bjs.gov/content/pub/pdf/fuo.pdf. Close to 40% of state inmates surveyed reported that they instead relied on family and friends to supply them with guns. *Id.*[5]

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censed sellers, fences, corrupt dealers, and straw purchasers. ATF Following the Gun, at ix.

[4] The available ATF data come largely from the 1990s because since 2000, the so-called Tiahrt Amendments in various congressional spending bills have restricted ATF's ability to collect and disseminate national tracing data. *See* Congr. Res. Serv., *Gun Control: Statutory Disclosure Limitations on ATF Firearms Trace Data and Multiple Hand-gun Sales Reports* (2009), *available at* https://www.fas.org/sgp/crs/misc/RS22458.pdf.

[5] The shooters in several notorious mass shootings, including the Newtown and Columbine school shootings, obtained their weapons through family members or friends. *See* Div. of Crim. Justice, State of Connecticut, *Report of the State's Attorney for the Judicial District of Danbury on the Shootings*

Tracing data also establish that crime guns are disproportionately new compared to guns in the general firearms pool. About 25% of the crime guns recovered in 1999 for which a time-to-crime ("TTC") could be computed had a TTC of twelve months or less, and another nine percent had a TTC of between one and two years. ATF Crime Gun Trace Reports 24; *see also* Anthony A. Braga et al., *Interpreting the Empirical Evidence on Illegal Gun Market Dynamics*, 89 J. Urban Health: Bulletin of the N.Y. Academy of Medicine 779, 787 (2012) ("Interpreting Empirical Evidence") (guns produced between 1996 and 1998 constituted more than 35% of the traced crime guns recovered in 1999). To put these numbers in context, a 1994 survey of gun owners showed that they had owned their firearm an average of thirteen years. ATF Crime Gun Trace Reports 24. ATF treats rapid TTC as an indicator that the firearm in question has been trafficked. ATF Following the Guns 25.

2. Although guns are diverted from the legal market to the illegal market by several means, "[t]he most frequent type of trafficking channel identified in ATF investigations is straw purchasing from federally licensed firearms dealers." ATF Following the Guns 10.

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at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 1, 2012, at 2 (2013), *available at* http://cbsnewyork.files.wordpress.com/2013/11/sandy_hook_final_report.pdf; *Report of Governor Bill Owens' Columbine Review Commission*, at 23 nn.58-59 (2001); *see also* Violence Policy Center, *Where'd They Get Their Guns? An Analysis of the Firearms Used in High-Profile Shootings, 1963 to 2001* (2001), *available at* http://www.vpc.org/graphics/where.pdf.

An ATF study of 1,530 firearms trafficking investigations conducted during the period July 1996 to December 1998 found that straw purchasing was the most common channel of illegal gun trafficking: straw purchases were involved in 46% of all trafficking investigations and were associated with nearly 26,000 illegally trafficked firearms. *Id.* at ix, xi. The number of trafficking incidents involving straw purchases was more than double the number attributable to the next largest source of trafficking (trafficking by unlicensed sellers). *Id.* at 11. Straw purchases represented approximately one-third of all illegally diverted firearms in this study. *Id.* at 13.[6]

3. Both prohibited and non-prohibited actual purchasers use guns obtained through straw purchases to commit crimes. In a recent example, Dawn Nguyen faces criminal charges for buying a semiautomatic rifle and a shotgun for her neighbor, William Spengler, who was ineligible to possess a gun because he had a prior criminal conviction for killing his grandmother. Spengler used those weapons to ambush firefighters lured to a blaze he had set at his home, killing two people and wounding three others. *Rochester Woman Who Acted as Straw Buyer of Guns Used by William Spengler in Webster Shooting Is Busted for Lying About Who Would Own the Weapons*, N.Y. Daily News, Dec. 28, 2012, http://www.ny

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[6] A follow-up study of 2,608 ATF gun trafficking investigations conducted between January 1, 1999 and December 31, 2002 yielded similar results: a plurality (41.3%) of trafficking investigations involved straw purchases from federally licensed dealers, and those investigations were associated with 38,032 firearms. Once again, straw purchases were by far the largest single pathway of illegal trafficking. Interpreting Empirical Evidence 782-83.

dailynews.com/new-york/woman-pleads-guilty-n-y-christmas-eve-firefighter-shootings-article-1.1291934. In another notorious case, Bennie Lee Lawson, a convicted felon under investigation for a triple homicide, obtained an automatic rifle through a straw purchase in Alabama. He used the rifle in Washington, D.C. to kill a police officer and two FBI agents and to wound another in 1994. *See* Firearms Trafficking 101; *see also, e.g.*, *United States v. Dupree*, 388 F. App'x 164, 166 (3d Cir. 2010) (straw purchase on behalf of a felon, who used the firearm in a shootout with police officers after stealing a car); *United States v. Moore*, 109 F.3d 1456, 1458-59 (9th Cir. 1997) (en banc) (straw purchase on behalf of a fourteen-year-old boy, who used the gun to kill a police officer).

Criminals without prior records who would not be prohibited from purchasing a gun directly also procure firearms through straw purchases and then use those weapons to commit crimes, including violent crimes and gun trafficking. For such persons, the use of straw purchasers is a means to avoid identifying themselves to authorities as the owners of crime guns. In *United States v. Frazier*, 605 F.3d 1271 (11th Cir. 2010), for example, defendant Frazier was eligible to purchase firearms, but he nonetheless employed straw purchasers, presumably to avoid calling attention to his stockpiling of firearms. *Id.* at 1279. Frazier then exported the stockpile of weapons he had procured through the straw purchases to Canada, resulting in his conviction for illegally exporting firearms. *Id.* at 1281; *see also United States v. Morales*, 687 F.3d 697 (6th Cir. 2012) (defendant who was eligible to purchase firearms instead at-

tempted to procure them through straw purchases as part of a conspiracy to illegally export firearms to Guatemala); Phil Ray, *Judge Upholds Banning Straw Buys*, Altoona Mirror, Oct. 24, 2013, http://www.altoonamirror.com/page/content.detail/id/575959/Judge-upholds-banning-straw-buys.html?nav=742 (man bought a pistol he was eligible to possess through a straw purchaser, and then used the gun to shoot three people).

Gangs are also notorious for using straw purchasers—whether a gang member or other third party with a clean criminal record—to obtain mass quantities of guns. Petitioner's interpretation of the federal statute provides street gangs and criminal organizations with an easy means of obtaining guns for the many members who are prohibited from buying guns because they have criminal records or are underage. *See, e.g.*, *United States v. Sargent*, 98 F.3d 325 (7th Cir. 1996) (straw purchaser bought forty-seven guns for his gang).

4. As these statistics and examples illustrate, straw purchases are strongly linked to crime, regardless of whether the actual purchaser was eligible to purchase the firearms directly. The West Virginia Brief, which emphasizes purportedly "legitimate reasons" for straw purchases of firearms such as convenience and price discounts, simply ignores the strong nexus between straw purchases, interstate gun trafficking, and crime. *See* W. Va. Br. 5. Petitioner's amici have presented no statistics—and amici are aware of none—to support a conclusion that a significant percentage of straw purchases are motivated by "legitimate reasons." Nor do they attempt to explain why so many straw purchasers buy

multiple firearms in a single transaction. *See* Inside Straw Purchasing 13-15 (finding, based on a review of more than 1,000 gun-related prosecutions concerning the sale of more than 14,000 firearms in over 4,000 separate transactions, that many traffickers have straw purchasers buy more than one gun per visit). The strong link between straw purchases and crime guns gives amici submitting this brief a compelling interest in ensuring that the federal statutes at issue here are enforced.

B. Petitioner's Construction Of The Statutes Would Undermine The Benefit Of Background Checks And Frustrate The Ability Of States To Combat Interstate Gun Trafficking

1. Petitioner and his amici advance interpretations of § 922(a)(6) and § 924(a)(1)(A) that would substantially undermine the federal scheme regulating firearm purchases. The core purposes of federal gun regulation are "to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them,'" *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983) (quoting *Huddleston*, 415 U.S. at 824), and to prevent the subversion of state gun laws by "a deadly interstate traffic in firearms and ammunition." H.R. Rep. No. 90-1577, at 19; *see supra* at 13-15. The "principal agent of federal enforcement is the dealer," *Huddleston*, 415 U.S. at 824. By requiring the inspection and recording of a buyer's identity at the point of sale by a federally licensed dealer, the federal system confirms with relative accuracy that the purchaser is in fact eligible to own the firearm and aids law enforcement in the event the gun is someday used in a crime. *See* 18

U.S.C. § 922(s) (requiring the dealer to "verify the identity" of the purchaser; keep a record of the purchaser's "name, address, and date of birth"; and confirm through one of various methods that the purchaser's possession of the handgun would not violate "Federal, State, or local law"). The lawfulness of a sale through a licensed dealer always depends on the completion of that process, and if the process has been adulterated by a false statement about the buyer's identity, the sale is no longer lawful and the straw buyer has violated both § 922(a)(6) and § 924(a)(1)(A).

Petitioner offers an extreme counterinterpretation of federal law: a gun purchaser can freely and lawfully lie about the existence of a preexisting arrangement to transfer the gun to someone else for consideration. Pet. Br. 21-22. The brief for the United States demonstrates why this interpretation is wrong as a matter of statutory construction. Amici can attest that it would be disastrous as a matter of policy. Petitioner's construction would eviscerate the federal regulation of gun sales, including the most basic background check requirement preventing felons and other prohibited persons from buying firearms. And as discussed above, the flow of guns from weaker-regulation States to stronger-regulation States is both significant and substantially driven by straw purchases on behalf of individuals who either cannot legally purchase a firearm or wish to conceal their identities. The current system confirms with the best-available level of accuracy that the transferee is eligible to purchase the gun, and it facilitates law enforcement efforts in the event the gun is later used in a crime. Federal law requiring confirmation

of the identity of the buyer and a background check at the point of sale thus provides an important—perhaps the most important—enforcement tool for preventing guns from ending up in the hands of dangerous persons and from traveling across state lines for use in crime.

2. Petitioner accepts that federal law prohibits knowing transfers to ineligible purchasers, and argues that the law need go no further. *See* Pet. Br. 27-28; 18 U.S.C. § 922(d). But a system that relies solely on the straw purchaser's personal knowledge of the actual buyer's eligibility to purchase a gun would inevitably fail to capture a considerable number of prohibited transactions that a simple background check would disclose. The straw purchaser may not know the actual buyer well, if at all. And even a close friend or relative of a buyer may not know that the buyer "is under indictment," § 922(d)(1), or was dishonorably discharged from the Armed Forces, § 922(d)(6); she may not know that he is under a restraining order for stalking, § 922(d)(8); she may not know that he has been convicted of domestic violence, § 922(d)(9), and she may not even know he is a convicted felon, § 922(d)(1). She also may not know whether his possession of a gun is prohibited by state laws specific to his place of residence, as a background check could confirm. The actual buyer likely would not want the straw purchaser to know any of these things, and the straw purchaser might well not want to know them herself, in order to avoid prosecution. After all, under petitioner's interpretation, the straw purchaser has committed no violation even if it turns out the actual buyer *is* a prohibited

person, if the straw purchaser lacks the mens rea required by § 922(d).

The exception petitioner demands thus allows firearms to end up in the hands of prohibited persons because the straw purchaser did not know, or have reason to believe, the actual buyer was a prohibited person. But the system actually enacted by Congress uses data-based background checks at the point of sale, rather than largely speculative or uninformed beliefs of transferors, to preclude sales to prohibited purchasers. Petitioner's contention that a straw purchaser may lawfully misidentify the true purchaser of a firearm in a sale by a federally licensed dealer would thus create a gaping loophole in the federal background check system—contrary to Congress's twin goals of "keeping firearms out of the hands of categories of potentially irresponsible persons," *Barrett*, 423 U.S. at 220, and supporting the law enforcement efforts of States that regulate gun possession and sales. *See Huddleston*, 415 U.S. at 832 n.11; *see also Markham v. Cabell*, 326 U.S. 404, 409 (1945) ("The policy as well as the letter of the law is a guide to decision.... The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve.").[7]

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[7] In this case, petitioner places much weight on the fact that his uncle cleared a later background check. Pet. Br. 12. But petitioner's construction would have wrongfully protected him even if the uncle had been a prohibited person (given any mens rea requirement). Petitioner easily could have been ignorant of criminal or mental health information about his uncle that a background check would have revealed. And even where

3. Excusing the falsification of the actual buyer's identity at the point of sale would not only gut the background check requirement designed to prevent sales of guns to ineligible purchasers, but would also deprive law enforcement officers of information that may be critical to solving crimes. Some purchasers may wish to evade the identification and recordkeeping requirements for sales by federally licensed dealers because they *intend* to use the purchased gun in a crime and do not wish it to be traced back to them. They may accordingly use a straw purchaser regardless whether they would be eligible to purchase the gun directly. Some would-be criminals use straw purchases to keep stockpiles of weapons secret from law enforcement authorities. The defendant in *United States v. Polk*, for example, was lawfully permitted to possess guns, but amassed an arsenal of weapons through straw purchases in order to obscure his plans to blow up the IRS building in Austin, Texas. *See* 118 F.3d 286, 289-91 (5th Cir. 1997); *see also Frazier*, 605 F.3d at 1274-76 (defendant was legally permitted to acquire guns but bought them through straw purchases in aid of his gun smuggling operation that delivered large quantities of firearms to Canada in exchange for money or drugs); *supra* at 20-21.

For these types of transactions, the use of a straw purchaser both conceals the scale of the weapons acquisition and disrupts the ability to trace guns used

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an additional background check on the uncle is performed before the last transfer is made, as occurred here, if his uncle had failed the check, petitioner would have been left with a gun he did not wish to own, possibly could not afford, and had a strong motive to sell, legally or otherwise.

in a crime—since straw purchasers may know little to nothing about the actual buyer, the trail often goes cold with them. Allowing straw purchases at the point of sale would undermine law enforcement's ability to monitor troubling weapon acquisition patterns and hinder law enforcement's ability to trace crime guns back to the actual buyers. *See* ATF Following the Gun, at x (firearm trace data and firearm sales records can be used to gain information on recovered crime guns, but "there is no effective way to track a gun beyond the first retail sale").[8]

For these reasons, petitioner's proposed alternative construction forbidding false statements to the dealer only when the actual buyer is a prohibited person is no better than his preferred construction allowing false statements regardless of the eligibility of the actual buyer. Because the federal oversight of firearm sales has independent value *even when* the true sale is to a lawful buyer, permitting purchasers to knowingly deceive dealers about the actual buyer of a firearm significantly undermines a core purpose of the firearms laws to aid law enforcement. *See Biswell*, 406 U.S. at 315-16 (observing that the fed-

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[8] *See also* Christopher S. Koper, *Purchase of Multiple Firearms as a Risk Factor for Criminal Gun Use: Implications for Gun Policy and Enforcement*, 4 Criminology & Pub. Pol. 749, 749 (2005) (tracking of multiple-gun purchases by law enforcement is important because they are associated with an elevated risk of illegal activity); Anthony A. Braga & Glenn L. Pierce, *Disrupting Illegal Firearms Market in Boston: The Effects of Operation Ceasefire on the Supply of New Handguns to Criminals*, 4 Criminology & Pub. Pol. 717, 717, 741-42 (2005) (analyzing data suggesting that "supply-side strategies [employing tracing data] can be used to good effect in shutting down direct pipelines of illegal guns to criminals).

eral scheme is concerned with "assur[ing] that weapons are distributed through regular channels and in a traceable manner[,] ...the prevention of sales to undesirable customers and the detection of the origin of particular firearms"); *United States v. Hensley*, 469 U.S. 221, 229 (1985) (recognizing the "strong government interest in solving crimes and bringing offenders to justice").

4. Petitioner's state amici contend that pinning violations of § 922(a)(6) and § 924(a)(1)(A) to a purchaser's resale intentions at the time of sale makes the statute difficult to administer and likely to deter legal conduct. W. Va. Br. 12-13. This argument misstates the issue. Federal law is not concerned with intent to resell the firearm in the future, but with a present *agreement* to transfer the gun to another person for consideration. An agreement to purchase a gun on another's behalf is ascertainable and capable of objective proof, as it was in this case, where the straw purchase was memorialized in a writing. Pet. App. 4a-5a. In contrast, petitioner's proposed case-by-case analysis of the straw purchaser's knowledge of the actual buyer's eligibility to possess a handgun under federal, state or local law will typically depend on subjective evidence that is *irrelevant* to the distinctly wrongful act of making a false statement when buying a firearm from a federally licensed dealer. A bright-line rule that forbids buyers to lie about preexisting straw purchase arrangements is clear, easy to apply, and easy to comply with. *See Davis v. United States*, 512 U.S. 452, 461 (1994); *see also United States v. Bass*, 404 U.S. 336, 351 (1971) ("[C]anons of clear statement and strict construction do 'not mean that every criminal stat-

ute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.'" (quoting *United States v. Bramblett*, 348 U.S. 503, 510 (1955)); *Arizona v. Gant*, 556 U.S. 332, 344 (2009) (recognizing that the State's law enforcement interests include an "interest in a bright-line rule"). And because it is both clear and easy to comply with, it is also a fairer rule.

C. The Near-Uniform Constructions Given To The Statutes By The Courts Of Appeals Impose No Serious Burdens On States Or Their Citizens

Petitioner's state amici recite a litany of burdens purportedly imposed by the application of federal law in this case. The complaints ring hollow when balanced against the important law enforcement interests discussed above, and none comes close to justifying the use of straw purchases to circumvent federal background check and recordkeeping requirements.

1. *Prohibiting false statements about the actual buyer of a gun does not implicate the Second Amendment.* Under § 922(b)(1), 18-to-20-year-olds may not lawfully purchase handguns from a federally licensed firearms dealer, and can thus acquire those types of firearms only through private sales or gifts, as permitted by state law. Petitioner's state amici argue that the prohibition of § 922(b)(1) violates the Second Amendment and that the federal straw purchase prohibitions infringe Second Amendment rights by chilling sales or gifts of handguns to young persons in this age range. This argument is misguided for multiple reasons. To begin

with, nothing about the false statement prohibitions limits private sales or gifts, which still may be made to 18-to-20 year-olds where allowed by state law. Moreover, in the case of sales by federally licensed dealers, the false statement prohibitions operate independently of § 922(b)(1). They do not specify who may purchase a gun, but rather require that purchaser's identity be truthfully disclosed and recorded.

Amici notably do not argue that the requirement of truthful statements in a gun purchase violates the Second Amendment, since the federal laws at issue here are "presumptively lawful" regulatory measures "imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008). And their argument that these laws have a constitutionally cognizable "chilling effect" is simply incorrect. Quite apart from the absence of *any* effect on private gun sales and gifts, there is no precedent for construing the Second Amendment to forbid regulations having a chilling effect on gun rights. Even in the First Amendment context, "the existence of a 'chilling effect' ... has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Younger v. Harris*, 401 U.S. 37 (1971).

2. *Prohibiting false statements about the actual buyer of a gun does not burden private intrastate gun sales.* As petitioner admits to the Court, under the construction given the federal laws below, private intrastate resales of guns purchased through a federal dealer—even immediate resales—remain permissible. Pet. Br. 22. Individuals can still transfer guns to purchasers out of State through a registered

dealer. *Id.* And if a purchaser later changes her mind and decides to get rid of the gun, the false statement prohibitions do not stand in her way. What is *not* permitted is the purchase of a gun, from a federally licensed dealer, under a *preexisting arrangement* to purchase the gun for an undisclosed other person. That prohibition closes a significant loophole in sales that are federally regulated, is clearly ascertainable, and reaches a distinct set of transactions. Moreover, many straw purchasers are desperate for drugs or money and could not afford to traffic in firearms if they were not doing so on another's behalf. *See, e.g*, Inside Straw Purchasing 9-10; CeaseFirePA, *Straw Purchaser Gets 60 Days Drug Treatment* (Sept. 18, 2013), *available at* http://www.ceasefirepa.org/courtwatch/2013-09-straw-purchaser-gets-60-days-drug-treatment. At the same time, a substantial portion of lawful gun commerce, especially intrastate, is not regulated by federal law, and properly construing the federal false statement prohibitions to forbid misrepresenting the identity of the actual buyer of a firearm to a federally licensed dealer does nothing to impair that trade.

3. *Prohibiting false statements about the actual buyer of a gun does not burden the States.* As discussed above, *supra* at 9-11, the various States have enacted a multiplicity of gun-law regimes. Private intrastate gun sales are subject to state law, which may regulate them strictly or not at all. These state law variations have produced a demonstrable flow of guns from weak-regulation States, where guns are freely available, to strong-regulation States, threatening to force on the strong-regulation States the lowest common denominator of gun regulation em-

braced by their neighbors. In this context, enforcing federal gun laws applicable in all States equally imposes no undue burden on weak-regulation States like West Virginia and its amici. States forgoing rigorous gun oversight have no special prerogative to override as a practical matter the stricter gun regulation of States whose citizens have deemed stronger laws "necessary and appropriate." W. Va. Br. 2; *see also United States v. Edge Broad. Co.*, 509 U.S. 418, 428 (1993) (recognizing that Congress has a substantial governmental interest in balancing the interests of States that regulate conduct to different degrees).

4. *Prohibiting false statements about the actual buyer of a gun does not unnecessarily inconvenience people.* Petitioner's amici contend that straw purchases should not be prohibited at the point of sale because people legitimately may wish to purchase guns for another as a matter of convenience. W. Va. Br. 5. But "convenience" does not overcome the significant public safety and law enforcement interests served by the federal regulation of gun sales, particularly when a lawful buyer could simply purchase the gun herself. In fact, there are many circumstances in modern society when confirmation of identity is required to complete a transaction—to purchase certain over-the-counter medicines, for example, or to purchase alcohol, or to get a passport. *See, e.g.*, Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109–177, 120 Stat. 192 (codified as amended in scattered sections of Title 21, among others)); W. Va. Code § 60-3A-25a; 22 C.F.R. § 51.21. In each of these instances, a person's ability to transact through a proxy is limited or forbidden to serve legitimate governmental interests. There can be no serious ques-

tion that the governmental interest in reducing gun violence by confirming a purchaser's eligibility to possess a gun at the point of sale and recording the purchaser's identity to aid future law enforcement efforts is as legitimate as the interest in verifying and recording a person's identity when purchasing medicine or other regulated products.

5. *Prohibiting false statements about the actual buyer of a gun does not unnecessarily burden individual interests in getting a bargain.* Petitioner's amici's asserted interest in helping their citizens "save money," W. Va. Br. 5, is misconceived for similar reasons. A person's interest in getting a good deal hardly outweighs the interest in preventing access to firearms by felons and other dangerous persons, mitigating illegal gun trafficking, and facilitating law enforcement's ability to trace crime guns, particularly since the federal regime allows resales provided they are conducted consistent with state and federal law. Moreover, the practice of transferring one's discount to an undisclosed buyer ineligible for the discount may not even be legal in many instances—*see, e.g.*, *United States v. McIntosh*, 380 F.3d 548, 550 (1st Cir. 2004) (fraud prosecution for purchase of computer equipment for resale using university discount); *United States v. Ferro*, 252 F.3d 964 (8th Cir. 2001) (fraud prosecution for discounted pharmaceutical purchases misrepresented to be for the buyer's own use). There is certainly no reason the government should stand down its efforts to combat crime in order to aid such transactions.

6. *Prohibiting false statements about the actual buyer of a gun does not burden gift-giving.* The prohibitions of § 922(a)(6) and § 924(a)(1)(A) are clearly

and specifically concerned with sales by federally licensed dealers, not gifts by private individuals. ATF Form 4473 likewise clearly and expressly does not forbid the purchase of guns as gifts. The distinction between straw purchases and gifts is perfectly logical. When a person buys a gun intending to make a gift of it, she is the purchaser in fact, not the intended recipient's agent, and there is no false disclosure. *Cf.* U.S. Br. 16-17, 20 n.4. No data show that criminals commonly receive the guns they use in crime as gifts. Indeed, if a gun given as a gift is later used in a crime, the investigative trail is far more likely to connect the purchaser to the recipient. And there is no reason to believe that gift-giving contributes in any significant way to the transportation of guns across States lines for use in crimes. The distinction drawn by federal law is plain, sensible, and crystal-clear. Individuals purchasing guns as gifts have no reason to fear prosecution under federal straw purchase prohibitions, and there is no reason to think that the straw purchase prohibitions deter such purchases.

* * *

The false statement prohibitions are a valid exercise of federal legislative power tailored to serve a powerful interest in reducing interstate gun trafficking and possession of firearms by persons ineligible to own them. Those interests in turn help amici implement their own regulatory efforts aimed at reducing gun violence, in service of their interests in public safety and law enforcement. Petitioner's convictions for violating § 922(a)(6) and § 924(a)(1)(A) are valid, and must be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-1493

In The Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae the City of New York (the "City"), is a municipal corporation existing by and under the laws of the State of New York. The City seeks *amicus* status in this case to stress its paramount interest in the continued prohibition of straw purchases of firearms under Federal law, and the preservation of straw purchase prosecutions as a viable law enforcement measure to address the scourge of gun violence that continues to plague not only large cities like New York City but the rest of the nation. The City has an especially strong interest in ensuring the accuracy of records identifying the actual purchasers of firearms, assuring the ability of law enforcement to investigate and interdict the gun-trafficking operations by which the majority of illegally-possessed handguns are transported into New York City, at great risk to its citizens and law enforcement professionals alike.

The Federal statutory requirement that firearms purchasers certify that they are the actual purchasers, and that federally-licensed gun dealers refuse to sell guns to anyone other than the actual gun purchaser has a direct impact on the safety of citizens of New York City, reducing the likelihood that illegal handguns will be used and recovered in

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[1] Petitioner has granted blanket consent to *amici curiae*, and Respondent's consent was obtained.

connection with crimes in the City. Records of federally-licensed gun dealers that document the true identity of gun purchasers permit law enforcement such as the New York Police Department (the "NYPD") and its NYPD-ATF Joint Firearms Taskforce to trace rapidly the path by which illegal handguns recovered in New York City found their way into the City, a crucial law enforcement tool in the investigation and prevention of gun violence that affects New York City and endangers its citizens.

ARGUMENT

The prohibition of straw purchases, through Sections 922(a)(6) and 924(a)(1)(A), is critical to law enforcement efforts to reduce and/or interdict the occurrence of firearms trafficking.

New York City is the safest large City in the nation, in part because its citizens have chosen to impose strict limits on who may possess firearms within its borders by enacting laws intended to, *inter alia*, keep guns out of the hands of juveniles and criminals. Those laws include prohibitions on the possession of firearms without a license, and on the possession of firearms by felons, persons with mental disorders, and persons under the age of 21; and requirements that prior written authorization be obtained by licensees from the NYPD before purchasing guns, and that the NYPD be notified by an owner when selling a gun. 38 RCNY §3-01 to 38

RCNY §5-33. Notwithstanding those efforts, during the 11 year period from 1995 to 2005, the NYPD's ballistics analysis unit processed more than 70,000 handguns that had been recovered by the NYPD or other law enforcement agencies. Virtually all of these firearms were recovered from individuals who were prohibited from possessing guns.[2]

Firearms are by far the preferred method of homicide in New York City, responsible for approximately 60% of the homicides committed each year. From 1995 to 2004, approximately 5,400 people died in New York City as a result of gun violence. In addition, tens of thousands of rapes, robberies and assaults were committed with guns in New York City during that time. Virtually every firearm involved in a violent crime was wielded by an illegal possessor. Plainly, gun violence in New York City is the result of the thousands of guns possessed by those for whom gun ownership is illegal by reason of criminal history, mental infirmity, age and, especially, lack of a license. Illegally possessed firearms are most commonly trafficked into New York City from distant states

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[2] *See* Amended Complaint in *City of New York v. A-1 Jewelry & Pawn, et al.*, 06 CV 2233 (JBW)(CLP), filed August 29, 2007 at ¶¶ 47-50. (Default judgment granted, 644 F. Supp. 2d 201 (E.D.N.Y. 2009), *aff'd* 645 F.3d 114 (2d Cir. 2010) (affirming default judgment while vacating injunctions and remanding for further proceedings)).

after being obtained from federally-licensed gun dealers ("Federal Firearms Licensees" or "FFLs"). Frequently, the guns are obtained through "straw purchases," in which a person legally permitted to purchase a firearm falsely asserts that they are the actual purchaser for the transaction in question, when in fact the gun is purchased for someone who is ineligible to purchase, or while eligible, merely wishes to remain an anonymous buyer.[3]

One law enforcement study showed that more than 50% of the firearms subject to firearm trafficking investigations had been acquired in straw purchases:

> Straw purchases are one of the most frequent methods used to divert firearms out of lawful commerce, where they are a heavily regulated commodity, and onto the street, where they are available to anyone. Convicted felons will simply use a friend, a family member or a girlfriend to buy a gun for them. The felon provides the money for the gun, selects the gun, and directs the purchase. The straw purchaser just fills out all of the required paperwork, posing as the buyer.

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[3] *Id.*

Firearms Trafficking 101 Or Where Do Crime Guns Come From? United States Attorneys bulletin, January 2002 at 7. *See also*, Department of the Treasury, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Following the Gun: Enforcing Federal Law Against Firearms Traffickers*, at 11, 18 (2000) ("*Following the Gun*") (available at https://www.atf.gov/sites/default/files/assets/Firearms/chap1.pdf)(concluding that between July 1996 to December 1998, 709 out of 1,530 (46%) gun trafficking investigations involved illegal straw purchasing.

A more recent study of straw purchasing was undertaken by Mayors Against Illegal Guns ("MAIG"),[4] a coalition of more than 1,000 of the Nation's mayors formed by New York City Mayor Michael R. Bloomberg and Boston Mayor Thomas M. Menino in 2006. *See* Mayors Against Illegal Guns, *Inside Straw Purchasing: How Criminals*

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[4] MAIG seeks to fight illegal possession and distribution of firearms in a manner consistent with the right of Americans to own guns. Mayors joining the coalition are asked to pledge to support several principles consistent with that goal, including: increased punishment for illegal possession, use and trafficking of firearms; holding FFLs accountable for permitting straw purchasing; and opposing restrictions on the use of firearms tracing data by ATF and other federal, state and local authorities. *See* Mayor's Against Illegal Guns, *Coalition Principles* (available at http://mayorsagainstillegalguns.org/html/about/principles.html).

Get Guns Illegally (April 2008) ("*Inside Straw Purchasing*"). MAIG's investigation of straw purchasing included a review of 1,000 firearms trafficking prosecutions, involving 14,000 firearms in 4,000 separate transactions; reports issued by ATF, the Federal Bureau of Investigation, the Department of Justice and the Centers for Disease Control and Prevention; interviews of 100 witnesses; expert studies; and other materials. *Inside Straw Purchasing*, at 6. *Inside Straw Purchasing* details the results of MAIG's investigation. The investigators concluded, *inter alia*, that traffickers repeatedly returned to stores with a reputation for allowing straw purchases, that straw purchasers were paid for their services in drugs and money, that FFLs often sell to straw purchasers who have no knowledge about the guns they purchase, that the "principal" often accompanies the straw purchaser into the FFL to purchase the gun, that multiple guns were purchased at each sale, that salespersons often allow straw purchases to occur despite suspicions, that trafficking across state lines is common, and that traffickers make large profits on the guns they acquire through straw purchases. *Id.* at 7-19.

Rigorous scientific analysis has shown that implementation of simple measures to prevent straw purchases will reduce the number of firearms diverted into the illegal market. For example, a recent study assessed the effect of lawsuits brought by New York City against 27 FFLs who had sold a

disproportionate number of guns later recovered at New York City crime scenes,[5] on the subsequent recovery of guns sold by those FFLs recovered in crimes. The bringing of the lawsuits -- and their resolution by consent decrees requiring FFL education and monitoring by a court-appointed Special Master -- reduced the odds that a gun sold by those FFLs would be recovered by the NYPD in New York City by **84.2%.** The findings were "consistent with a growing body of research evidence which indicates that gun dealers' sales practices affect the probability of guns getting to criminals, and that policies designed to hold gun sellers accountable can curtail the diversion of guns to criminals." Daniel W. Webster and Jon S. Vernick, "Spurring Responsible Firearms Sales Practices Through Litigation," Ch. 9 in Webster and Vernick, Eds, *Reducing Gun Violence in America* at p. 130.

The New York City litigation result described by the Webster and Vernick study confirms the wisdom of ATF's recommendation that an FFL confronted with indicators of a potential straw purchase should probe the parties to ensure that the person buying the firearm is the actual purchaser. To that end, a videotape presentation by an ATF agent instructs retailers that they can

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[5] *See City of New York v. A-1 Jewelry & Pawn, Inc.*, 06 CV 2233 (E.D.N.Y.); *City of New York v. Bob Moates Sports Shop, Inc.*, 06 CV 6504 (E.D.N.Y.).

prevent straw purchases, and the consequent diversion of firearms into the illegal market, by adhering to an important principle: if one person fills out the paperwork to purchase a firearm, that same person should pay for the firearm. National Shooting Sports Foundation videotape, *Identifying and Deterring Straw Purchasers*.

In the face of indisputable evidence that the prevention of straw purchasing by identifying the actual purchaser of a firearm is the key to preventing the illegal trafficking of guns, Petitioner and several *amici curiae* supporting its appeal urge this Court to invalidate the only mechanism available to address the diversion of handguns into the illegal market by straw purchasers -- prosecutions under Sections 922(a)(6) and 924(a)(1)(A). Under the guise of challenging the application of the "straw purchase doctrine" to circumstances where the ultimate purchaser of the handgun is legally eligible to purchase a handgun, Petitioner and the *amici curiae* seek to overturn the doctrine writ large. *See* Petitioner's Brief, pp. 23-31 (arguing that the "legal fiction" of the "court-created straw purchaser doctrine is an impermissible judicially created expansion of the unambiguous text of § 922(a)(6) which this Court should disapprove"); Brief *Amicus Curiae* of Congressman Steve Stockman, et al., pp. 25-31 (arguing that the ATF's "unilateral" straw purchase doctrine prohibiting firearm transfers involving eligible third parties encroaches on

Congress' legislative powers and misrepresents that it is illegal for any person to buy a firearm on behalf of another person eligible to own it); *Brief Amicus Curiae of NRA Civil Rights Defense Fund*, pp. 7-32 (seeking to invalidate the "actual buyer" requirement imposed by question 11.a of Form 4473).

As the brief of the United States makes clear, such an interpretation would entirely undermine the purposes of the Gun Control Act. *See* United States' Brief at p. 17 (commenting that "Petitioner's ... reading, under which [the statutory requirements] would be completely satisfied by the identity of a straw purchaser with only ephemeral control of the firearm, would render them utterly ineffectual in carrying out Congress's obvious purpose in enacting them, *i.e.*, to ensure that those coming into possession of firearms from licensed dealers are eligible to do so and that their identities are known.").

Petitioner's position also goes far beyond the analysis that is necessary or appropriate to address the narrow issue properly before this Court. The City urges this Court to uphold existing jurisprudence which takes a common sense approach to the prohibition of straw purchases as violations of Sections 922(a)(6) and 924(a)(1)(A). As set forth *infra* Point I.A, straw purchases prosecuted as violations of Sections 922(a)(6) and 924(a)(1)(A) involve nothing more than a legitimate

statutory interpretation of the Gun Control Act. Even where the "straw" purchases a firearm for an Eligible Principal, as set forth infra Point I.B, there is nothing impermissible about such prosecutions. Such prosecutions, which limit the number of firearms illegally trafficked to New York City and reduce gun violence and bloodshed on City streets, are a legitimate law enforcement tool that ought to be upheld by this Court.

I. Abramski's Virginia Gun Purchase as an Agent for his Out-of-State Uncle Violates Sections 922(a)(6) and 924(a)(1)(A) Regardless of the Uncle's Status as a Principal Eligible to Purchase a Gun in Pennsylvania

A straw purchase is nothing more than a purchase in which a person who is eligible to purchase a firearm under Federal, State and applicable local law (the "Straw"), acts as an agent or intermediary for another, the principal, who is either ineligible to purchase a firearm (hereinafter the "Ineligible Principal") or eligible to purchase a firearm, but desires anonymity (hereinafter, the "Eligible Principal") (a "Straw Purchase"). *United States v. Howell*, 37 F.3d 1197, 1202 (7th Cir. 1994) (describing typical Straw Purchase involving an Ineligible Principal); National Shooting Sports Foundation, *Don't Lie for the Other Guy, The Firearm Industry's Anti-Straw Purchasing Program* (pamphlet from firearm industry trade

group, in partnership with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), defining straw purchase to include both Ineligible and Eligible Principals) (the "Don't Lie Pamphlet," available at http://www.nssf.org/factsheets/PDF/strawPurchase.pdf).[6]

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[6] The *Don't Lie* Pamphlet defines a straw purchase, as follows: "A straw purchase occurs when the actual buyer of a firearm is unable to pass the required federal background check, or does not want his or her full name associated with the purchase, and has someone else who can pass the required background check purchase the firearm for him or her." ATF agrees with this interpretation:

> In some instances, a straw purchaser is used because the actual purchaser is prohibited from acquiring the firearm. That is to say, the actual purchaser is a felon or is within one of the other prohibited categories of persons who may not lawfully acquire firearms or is a resident of a State other than that in which the licensee's business premises is located. Because of his or her disability, the person uses a straw purchaser who is not prohibited from purchasing a firearm from the licensee. *In other instances, neither the straw purchaser nor the actual purchaser is prohibited from acquiring the firearm.*

In both instances, the straw purchaser violates Federal law by making false statements on Form 4473 to the licensee with respect to the identity of the actual purchaser of the firearm, as well as the actual purchaser's residence address and date of birth. The actual purchaser who utilized the straw purchaser

Straw purchase transactions are a federal crime, not because the purchase violates a criminal statute expressly criminalizing the conduct *in haec verba*, but because the conduct connected to the purchase violates the plain language of two federal statutes that prohibit misrepresentations to FFLs: 18 U.S.C. §922(a)(6) (prohibiting false statements with respect to any fact material to the lawfulness of the sale of a firearm) and 18 U.S.C. §924(a)(1)(A) (prohibiting a false statement with respect to information required to be kept by an FFL). Although "[t]he term 'straw purchase' is not defined in either the United States Code or the Code of Federal Regulations[,] a Straw Purchase is simply 'a judicially created doctrine, a construction of one of the provisions of the Gun Control Act of 1968, 18 U.S.C. § 922(a)(6).'" *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala 1998) (citing *United States v. Moore*, 109 F.3d 1456, 1460-1461 (9th Cir. 1997) ("'straw man doctrine,' as it is referred to is nothing more than a long-standing construction of the relevant statutes ....")).

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to acquire a firearm has unlawfully aided and abetted or caused the making of the false statements.

Bureau of Alcohol, Tobacco, Firearms and Explosives, Federal Firearms Regulations Reference Guide, at 165 (2005) (emphases added) (available at http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf).

The gravamen of a violation of either Sections 922(a)(6) or 924(a)(1)(A) in a Straw Purchase is the making of false statements to an FFL. Although neither Sections 922(a)(6) nor 924(a)(1)(A) on their face prohibit "straw purchases," it is entirely settled that such transactions violate both provisions. "It is clear . . . indeed, the plain language of the statute compels the conclusion . . . that §922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the 'lawfulness of the sale' of firearms." *United States v. Polk*, 118 F.3d 286, 295 (5th Cir. 1997); *United States v. Ortiz-Loya,* 777 F.2d 973, 979 (5th Cir. 1985) (holding in prosecution under 18 U.S.C. §922(a)(6) that in signing ATF form the straw purchaser made a misrepresentation of material fact).

Straws can be prosecuted under either statute, although Section 922 prosecutions appear to predominate. Prosecutions can proceed simultaneously under both Sections 922 and 924 for the same transaction, because each section requires proof of an element that the other does not. The same conduct can thus produce two separate statutory violations. *United States v. Sullivan,* 459 F.2d 993, 994 (8th Cir. 1972). Section 922 requires proof that the defendant made a false statement material to the lawfulness of the sale of firearms. *Polk*, 118 F.3d at 295 ("[T]he plain language of the statute compels the conclusion . . .

that §922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the 'lawfulness of the sale' of firearms."). By contrast, Section 924 only requires proof of a false statement *related to information required by law to be kept in the records of a federally-licensed firearms dealer.* This information need not necessarily be material to the lawfulness of the sale, and Section 924 does not require proof of materiality. *United States v. Hawkins*, 794 F.2d 589, 591 (11th Cir. 1986).

To sustain a conviction under Section 922, the government must prove beyond a reasonable doubt that: (1) the defendant knowingly made; (2) a false or fictitious written statement in connection with the purchase of firearms; (3) intended to deceive or likely to deceive a licensed firearms dealer; (4) and the false statement was a fact material to the lawfulness of the sale or disposition of the firearm. *United States v. Ortiz*, 318 F.3d 1030, 1036 (11th Cir. 2003); *United States v. Nelson*, 221 F.3d 1206, 1210 n.6 (11th Cir.), *cert. denied*, 531 U.S. 951 (2000); *Polk*, 118 F.3d at 294-95.

A. Straw Purchase Charges Prosecuted as Violations of Sections 922(a)(6) and 924(a)(1)(A) Involve Nothing More than a Legitimate Statutory Interpretation of the Gun Control Act

ATF Form 4473 is the foundation on which every Straw Purchase prosecution must rest. Form 4473, which a firearm purchaser must fill out when purchasing a firearm, consists in large part of a series of questions intended to identify the buyer (name, address) and test the qualifications of the purchaser, *e.g.*, the purchaser's age, mental history and criminal history.[7]

For purposes of Section 922(a)(6), Form 4473 solicits the "facts material to the lawfulness of the sale of firearms," and a false representation on Form 4473 therefore violates Section 922(a)(6), if the fact is "material to the lawfulness of the sale of firearms." For purposes of Section 924, Form 4473 solicits "the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter." Providing false facts on Form 4473 therefore violates Section 924, because Form 4473 must be kept in the records of the dealer selling the firearm.

Question 11 and its subparts on Form 4473 requests information necessary for an FFL to determine whether a person is legally entitled to purchase a firearm consistent with federal law. In particular, Question 11.a focuses on who is the "actual buyer," so that a firearms purchaser cannot

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[7] Form 4473 is available on ATF's website. *See* http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf.

simply avoid the federal eligibility requirements by hiding behind an agent. Question 11.a asks:

> Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.** *(See Instructions for Question 11.a)*

(Emphasis in original.) The Instructions for Question 11.a provide, "For purposes of this form, you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself ...."

Thus, because the identity of the actual buyer is "a fact material to the lawfulness of the sale" of a firearm under Section 922, a false representation concerning the identity of the "actual buyer," which is inherent in a Straw Purchase, violates that section. *See, e.g., United States v. Morales*, 687 F.3d 697, 700-01 (6th Cir. 2012); *United States v. Frazier*, 605 F.3d 1271, 1279 (11th Cir. 2010); *United States v. Phanphil*, 57 M.J. 6, 8 (C.A.A.F. 2002); *United States v. Crandall*, 453 F.2d 1216, 1216-17 (1st Cir. 1972). Section 924 similarly applies to straw purchases because a Straw who purchases on behalf of a Principal

misrepresents him or herself to be the actual buyer of the firearm. *United States v. Nelson*, 221 F.3d 1206, 1210 (11th Cir. 2000)). "[A] false representation made with respect to the identity of the actual buyer of a firearm is prohibited under § 924(a)(1)(A)." *United States v. Belt*, 250 Fed. Appx. 957, 958-59 (11th Cir. 2007) (citing *Nelson*, 221 F.3d at 1209-10).

It is equally clear, however, that when the person answering Question 11.a is indeed the "actual buyer" of the firearm (*i.e.*, the person is not a Straw), there is no misrepresentation for purposes of either Section 922 or Section 924. The legality *vel non* of a purported Straw Purchase thus turns on the definition of "actual buyer." As set forth on Form 4473, a person is an "actual buyer" if the gun is purchased "for yourself," and not "for" or "on behalf of" someone else.

There is substantial, unanimous authority explaining what it means to purchase a gun "for yourself" and not "for" or "on behalf of" someone else. The "'actual buyer' for the purpose of ATF Form 4473 is the person who supplies the money for *and intends to possess the firearms*, not the 'straw man' or agent." *Belt*, 250 Fed. Appx. at 958-59 (citing *Nelson*, 221 F.3d at 1210). "[I]f the person buying [the guns] has no intention of keeping them for herself or giving them as a gift, she misrepresents that she is the 'actual buyer.'" *Id.* "The actual buyer is the person who is actually

going to take possession of the firearm." *United States v. Moore*, 109 F.3d 1456, 1461 (9th Cir. 1997) (*en banc*); *United States v. Lawrence*, 680 F.2d 1126, 1128 (6th Cir. 1982) (determining in a prosecution under Section 922 that defendant who signed ATF form with no intention of keeping the weapons is not transferee or buyer).

The analysis in *United States v. Ortiz*, 318 F.3d 1030 (11th Cir. 2003), is illustrative. In *Ortiz*, a Georgia resident purchased guns in Georgia and transported them to New York City at the request of a City resident, who purchased them from Ortiz upon Ortiz's arrival in New York: "[A] straw transaction occurred here because "at the time of completing Form 4473 Ortiz [the Straw] had no intention of keeping the firearms or giving them as a gift. . . ." *Id.* at 1038. Ortiz therefore misrepresented that he was the actual buyer. *Id.* "Ortiz ...bought the firearms for Rivera, promptly delivered them to Rivera and was paid by Rivera." *Id.* "Ortiz equally was not buying the guns sold to Jenkins for himself or as a gift to another, but specifically was purchasing the guns for the sole purpose of immediately delivering and selling them to a ... buyer in New York City . . ." 318 F.3d at 1038 (emphasis added); *see Belt*, 250 Fed. Appx. at 959 (affirming conviction because "Belt attested that she was the actual purchaser of the guns when she did not intend to keep the guns for herself or

give them away as a gift.").[8] Straws acting with knowledge that the guns they purchase are to be resold, evidencing the Straw's intent at the time of sale to surrender possession, are also not "actual buyers."[9]

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[8] *Accord United States v. Nelson*, 221 F.3d 1206, 1210 (11th Cir.) ("representations [by Agent] were false because [Principals] supplied the money for these purchases, intended to possess the firearms, and thus actually bought these firearms"), *cert. denied*, 531 U.S. 951 (2000); *United States v. Moore*, 109 F.3d 1456, 1461 (9th Cir. 1997) (en banc) (straw purchase where, *inter alia*, Straw "had no intention of keeping the gun for himself"); *United States v. Howell*, 37 F.3d 1197, 1202 (7th Cir. 1994) (evidence supported Straw's conviction where, *inter alia*, principal and straw did not deny statement that dealer did not think Agent was picking up gun for herself); *United States v. Phanphil*, 57 M.J. 6, 8 (C.A.A.F. 2002) (Agent convicted where, on Form 4473, he certified that he was the actual buyer of the firearms, "knowing full well that the firearms would be going to" Principal).

[9] *See, e.g., United States v. Blake*, 394 F.3d 1089 (8th Cir. 2005); ("[Agent] knew the guns would be resold on the black market in another state..."); *In re Sealed Case*, 352 F.3d 409 (D.C. Cir. 2003) (sustaining conviction for conspiracy to falsify firearms transaction records where testimony showed appellant knew guns to be transported to the District of Columbia for resale); *United States v. Abfalter*, 340 F.3d 646, 651 (8th Cir. 2003) (evidence sufficient to prove Agent was not actual buyer where she purchased guns for Principal to resell later); *United States v. Soto*, CR. NO. 06-328-2, 2007 U.S. Dist. LEXIS 17070, at *14-15 (E.D. Pa. Mar. 8, 2007) ("[Principal's] knowledge of the falsity of the statement that [Agent] was the actual owner was demonstrated by the

B. The Prosecution of a Straw Who Buys for an Eligible Principal is an Application of a Legitimate Interpretation of Sections 922(a)(6) and 924(a)(1)(A)

Three Circuit Courts have explicitly upheld the conviction of a Straw for an Eligible Principal under Sections 922(a)(6) and 924(a)(1)(A). *See United States v. Abramski*, 706 F.3d 307 (4th Cir. 2013)[10]; *United States v. Morales*, 687 F.3d 697 (6th Cir. 2012); *United States v. Frazier*, 605 F.3d 1271 (11th Cir. 2010). The Fifth Circuit, as well, has upheld the conviction in such circumstances, without addressing the Eligible Principal's status explicitly. *United States v. Ortiz-Loya*, 777 F.2d 973, 981 (5th Cir. 1985).

In *Frazier*, the Eleventh Circuit, in determining whether the identity of the purchaser was "material to the lawfulness of the sale" appropriately focused on the actual identity of the

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evidence that [Principal] knew the gun was being purchased to resell ...").

[10] Significantly, while the ultimate purchaser in this case is an Eligible Principal in that he was eligible to purchase *a firearm*, he was not, in fact, eligible to purchase *this firearm* from Town Police Supply, the Virginia FFL where Abramski made the purchase, since he is not a resident of the state of Virginia. *See* the Brief of the United States at pp. 29-30 on this point.

purchaser and not on whether the purchaser's identity affected the lawfulness of the sale:

> To say that the identity of the actual purchaser is material to the lawfulness of one sale [involving an Ineligible Principal] but not to another [involving an Eligible Principal], is counterintuitive. Although Polk focused on whether one's identity affected the lawfulness of a sale under §922(a)(6), we focus on whether one's identity is a fact that is material to the lawfulness of a sale. The identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under §922(a)(6). Thus, it can be reasoned that although the lawfulness of a sale may change depending on the identity of the purchaser, the fact that the identity of the purchaser is material to the lawfulness of the sale does not.

Frazier, 605 F.3d at 1280 (emphasis added)(citing *Polk*, 118 F.3d at 295; *Ortiz*, 318 F.3d at 1036-37); *see also Morales*, 687 F.3d at 701 (noting that "the identity of the purchaser is, of course, central to the determination of his eligibility or ineligibility to purchase a firearm[,]" and that "[w]here, as here, the purchaser is in fact eligible to purchase the

firearm, his identity is no less material to the lawfulness of the transaction[.]").

Section 924(a)(1)(A) also applies to the prosecution of a Straw of an Eligible Principal. That section, which requires only truthful disclosure of information required to be kept by an FFL, contains no materiality requirement. As noted by the Eleventh Circuit in *Nelson*, numerous provisions of the Gun Control Act require disclosure of actual buyer:

> Several provisions in Chapter 44 of Title 18 of the United States Code, which is the 'chapter' referred to in §924(a)(1)(A), require licensed firearms dealers to keep records containing information about the identity of individuals who buy firearms. These provisions include 18 U.S.C. §§ 923(g), 922(b)(5), and 922(s)(3). Section 923(g) sets forth the general requirement that 'each ... licensed dealer shall maintain ... records of ... sale[] or other disposition of firearms at his place of business.' Section 922(b)(5) then makes clear that these records must contain, at a minimum, 'the name, age, and place of residence' of any individual who purchases a firearm from a licensed dealer. In addition, prior to selling a

> handgun to an individual 'transferee,' a licensed dealer must, under section 922(s)(3), obtain a statement from that transferee which contains 'the name, address, and date of birth appearing on a valid identification document ... of the transferee and a description of the identification used.' Further, the dealer must verify the transferee's identity by examining the identification document described in the transferee's statement. Thus, licensed firearms dealers are required to keep information about the identity of firearms buyers in their records. As a result, false statements or representations relating to this information are prohibited under §924(a)(1)(A).

Nelson, 221 F.3d at 1209 (citing 18 U.S.C. §§ 923(g)(1)(A); 922(b)(5); 922(s)(3)); 924(a)(1)(A)).

The information "material to the lawfulness of the sale" as provided for in Section 922(a)(6), and the information required to be kept by the FFL pursuant to Section 924(a)(1)(A), for present purposes, is simply the identity of the purchaser, the actual buyer of the firearm. To interpret those sections to only require true and accurate disclosure of the Straw renders the requirement of identifying the person who will eventually actually

possess the gun a nullity because that actual possessor, the Principal, could hide behind his or her agent and escape the requirements of both statutes. *Nelson*, 221 F.3d at 1209; *accord Soto*, 539 F.3d at 198; *United States v. Lawrence*, 680 F.2d 1126, 1128 (6th Cir.1982) (to exclude straw purchasers from the ambit of Section 922(a)(6) would be "tantamount to a repeal of those provisions"); *United States v. White*, 451 F.2d 696, 699-700 (5th Cir.1971) (noting that "[s]urely, Congress could not have intended to allow such easy evasion of a comprehensive scheme" by excluding straw purchasers from the ambit of Section 922(a)(6)).

By falsely disclosing that he was the actual buyer on Form 4473, Bruce James Abramski, Jr., the Petitioner and Agent here who purchased the firearm on behalf of his uncle, Angel Alvarez, an Eligible Principal [11], was subject to prosecution under both Sections 922(a)(6) and 924(a)(1)(A). Alvarez's identity, as the actual buyer of the firearm, was material to the lawfulness of the sale, because it was for the FFL and ATF to determine whether or not Abramski's purchase was lawful and whether Alvarez was in fact eligible to purchase. By lying in response to Question 11.a on Form 4473, Abramski therefore violated Section 922(a)(6). Moreover, that lie also amounts to a

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[11] *See, infra*, footnote 6.

violation of Section 924(a)(1)(A) because the identity of the actual buyer is information required to be kept by FFLs.

II. This Court Should Dismiss the Petition as Improvidently Granted Because there is No Circuit Split on the Question of Whether Petitioner Abramski's Conviction Can Stand

Petitioner cites no Circuit Court authority on the precise issue of whether a Straw can be convicted under Sections 922(a)(6) and 924(a)(1)(A) when the Straw lies on Form 4473 by claiming to be the actual buyer of the gun but knowing that he or she is acquiring the gun for an undisclosed Eligible Principal. The two cases cited by Petitioner as creating the Circuit split justifying this Court's *certiorari* jurisdiction – *United States v. Polk*, 118 F.3d 286 (5th Cir. 1997) and *United States v. Moore*, 109 F.3d 1456 (9th Cir. 1997) (*en banc*) – did not involve prosecutions of Straws under circumstances similar to Petitioner.

In *Polk*, the Fifth Circuit considered the prosecution of the Eligible Principal under an aider and abettor theory of liability. The Straw in *Polk* was actually the Government's confidential informant, who was not being prosecuted. Although the Court in *Polk* did question the viability of prosecutions under Sections 922(a)(6) and 924(a)(1)(A) in the case of an Eligible Principal,

it ultimately concluded "that Polk's participation in the alleged crime consisted of nothing more than a request to purchase firearms." *Polk*, 118 F.3d at 296. The Fifth Circuit distinguished its earlier holding in *United States v. Ortiz-Loya*, a case involving an Eligible Principal, because in that case the "evidence showed that the defendant (1) instigated the entire transaction; (2) provided up-front money for the purchase; and (3) because he did not have a Texas drivers' license (the defendant left it in Mexico), asked others to accompany him to sign the ATF forms." *Polk*, 118 F.3d at 296 (citing 777 F.2d 973, 981 (5th Cir. 1985)). Thus, rather than deciding that Polk's conviction could not stand because he was an Eligible Principal,[12] the Fifth Circuit actually held that Polk's conviction could not stand because there was insufficient evidence to support Polk's role as an aider and abettor of the Agent. *See Polk*, 118 F.3d at 296 (reversing Polk's conviction for aiding and abetting a violation of Section 922(a)(6) because of "insufficient evidence").

In *Moore*, the Ninth Circuit upheld the conviction of a Straw charged with a violation of Section 922(a)(6). The Straw in *Moore* was an elderly neighbor recruited by a 14-year old to purchase a gun for the latter. The 14-year old, by definition an Ineligible Principal, *see* 18 U.S.C.

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[12] Polk's status as an Eligible Principal was not at issue in the case because, at the time of his arrest he had no felony convictions that would render him ineligible.

§922(b)(1), recruited the neighbor after his mother refused to buy a gun for him. In purchasing the gun, the Straw lied on Form 4473 by claiming to be the actual purchaser. When questioned by the FFL, the Straw lied again, falsely stating that he was the child's grandfather and would hold the gun until the child reached age 21. The FFL, not satisfied with the answer, inquired about whether the child's parents consented to the purchase. The child's mother, who had been waiting in the car, briefly appeared in the store to confirm the Straw's lies regarding his status as the child's grandfather and his intent to hold the gun until the child could legally own it. Although the Court expressed some doubt about the viability of a prosecution of a Straw under Section 922(a)(6) in the case of an Eligible Principal, the *en banc* panel never actually decided that the prosecution was impermissible because the jury rejected the mother's claim that she, an otherwise Eligible Principal, was the actual buyer of the gun.[13]

There is accordingly no split in authority among the Circuit Courts justifying the grant of

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[13] Like the principal in *Polk*, the principal in *Moore*, the fourteen-year old child, was hardly an innocent. Bobby Moore used the gun his neighbor purchased for him "to shoot Ronald Wade Feldner, a New Plymouth, Idaho police officer, in the face. Officer Feldner died, leaving behind a wife and minor children." *Moore*, 109 F.3d at 1459; *see also State v. Moore*, 906 P.2d 150 (Idaho Ct. App. 1995) (upholding sentence of 25 years to life following Moore's guilty plea).

certiorari in this case. Every Circuit Court that has considered the prosecution of a Straw who falsely states on Form 4473 that he or she is the actual buyer, when in fact the actual buyer is an Eligible Principal, has concluded that such conduct violates Sections 922(a)(6) and 924(a)(1)(A). *See United States v. Abramski*, 706 F.3d 307 (4th Cir. 2013); *United States v. Morales*, 687 F.3d 697 (6th Cir. 2012); *United States v. Frazier*, 605 F.3d 1271 (11th Cir. 2010). In the absence of a split in authority among the Circuit Courts, or any other ground asserted by Petitioner for this Court's grant of *certiorari*, it is appropriate for this Court to dismiss this case as improvidently granted, if the Court indeed did not fully appreciate the lack of a split. *See* Sup. Ct. Rule 10; *The Monrosa v. Carbon Black Export*, 359 U.S. 180, 183-184 (1959).

CONCLUSION

For all the above reasons, and those stated in the United States' brief, Abramski's conviction should be upheld. The ability to prosecute purchasers for falsehoods made in connection with the purchase of a firearm is critical to law enforcement efforts to attack the straw purchases that serve as the primary means by which guns are diverted from the legal market into the illegal market. The frequency with which such diverted guns are later recovered in connection with crimes in New York City, make straw purchase prosecutions especially important to the ability of the City to protect its citizens from gun violence. Accordingly, the City of New York urges this Court to affirm the decision of the Court of Appeals for the Fourth Circuit.

Dated: New York, New York
December 30, 2013

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1493

DEC 3 2013

In The

Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE NRA CIVIL RIGHTS DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Bureau of Alcohol, Tobacco, Firearms and Explosives exceeded its statutory authority by criminalizing otherwise perfectly lawful conduct by simply amending a form – without notice and rulemaking – that firearms purchasers fill out when purchasing a firearm.

2. Whether the Bureau of Alcohol, Tobacco, Firearms and Explosives improperly adopted legislative rules redefining straw purchases, to include federal firearm licensees transferring firearms to persons who are not "actual buyers," and requiring transferees to certify that they are in fact actual buyers, all without notice and comment.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The NRA Civil Rights Defense Fund assists in the defense of the constitutional right to keep and bear arms by providing legal and financial assistance in cases relating to said right. It has a compelling interest in this case because BATFE prohibits lawful conduct.

SUMMARY OF ARGUMENT

From 1980 to approximately early 1995, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE") publicly took the position that the Gun Control Act of 1968 ("GCA") did not prohibit transfer of a firearm by a federal firearm licensee ("FFL") to a person he knew to be purchasing the firearm for another person, unless the FFL knew that the ultimate recipient was prohibited from possessing or receiving the firearm. BATFE took the position that "straw purchases" were of "two basic types," both of which involved at least one person who was prohibited

[1] No counsel for any party authored this brief in whole or in part, nor made a financial contribution for the preparation or submission of this brief. Funding for printing and submission of this brief was provided solely by the Fund. This brief is filed with the written consent of all parties, and, furthermore, Petitioner has granted blanket consent and filed the same with the clerk of this Court. Amicus complied with the conditions of those consents by providing timely notice of its intention to file this brief.

from possessing firearms. ATF Industry Circular 79-10, reprinted in (Your Guide To) Federal Firearms Regulation 1984-85, ATF P 5300.4 (1984), at 63, and (Your Guide To) Federal Firearms Regulation 1988-89, ATF P 5300.4 (1988), at 78.

Sometime around early 1995, BATFE unceremoniously and abruptly reversed its position by adding a variant of what is now Question 11.a to Form 4473, and by announcing its new policy in two informal guidance publications: the Federal Firearms Regulation Reference Guide, ATF P 5300.4 (the "Reference Guide"), from version 10-95 onward, and the Federal Firearms Licensee Quick Reference and Best Practices Guide, ATF P 5300.12 (the "FFL Quick Reference Guide"). We will refer to this more recent position as the "actual buyer policy."

The effect of BATFE's amendment to Question 11.a of Form 4473 was to criminalize the legal transfer of firearms between non-prohibited persons. There is no statutory authority for this prohibition and it violates the plain intent of Congress in passing the GCA) – as specifically stated in the GCA itself, the GCA's preamble and legislative history. Furthermore, the Fifth and the Ninth Circuits both support the conclusion that Form 4473 conflicts with the plain intent of Congress.

ARGUMENT

I. BATFE'S PROHIBITION OF THE TRANSFER BY A NON-PROHIBITED PERSON TO ANOTHER NON-PROHIBITED PERSON, IS NOT A PERMISSIBLE CONSTRUCTION OF THE GUN CONTROL ACT

A. Congress' plain intent in enacting the GCA was: (1) to prevent the transfer of firearms to certain "prohibited" persons; and (2) not to interfere with the acquisition of firearms by non-prohibited persons.

The GCA contains a list of persons who are prohibited from possessing firearms and ammunition and to whom it is unlawful for firearms or ammunition to be transferred or delivered to. 18 U.S.C. §§922(d) and (g). Specifically, §922(d) prohibits the transfer of firearms to "prohibited persons," such as convicted felons, certain misdemeanants, persons adjudicated mentally incompetent, persons involuntarily committed to mental institutions, etc. 18 U.S.C. §922(d).

> Congress . . . sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous. These persons are comprehensively barred by the Act from acquiring firearms by any means. Thus, § 922(d) prohibits a licensee from knowingly selling or otherwise disposing of any firearm . . . to the same categories of potentially irresponsible persons.

Barrett v. United States, 423 U.S. 212, 218 (1976). "Similarly, §922(g) prohibits the same categories of potentially irresponsible persons" from possessing firearms. *Id.*

The GCA also includes a prohibition against making a "false or fictitious oral or written statement . . . intended or likely to deceive [a firearms dealer] with respect to any fact material to the lawfulness of the sale or other disposition of such firearm. . . ." 18 U.S.C. §922(a)(6). The GCA also criminalizes knowingly making "any false statement . . . with respect to the information required by this chapter to be kept in the records of a" federal firearms dealer. 18 U.S.C. §924(a)(1)(A).

Congress stated its intent in the GCA's preamble:

> Congress hereby declares that . . . it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms . . . and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulation of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.

Gun Control Act of 1968, §101, pmbl., 82 Stat. 1213 (current version at 18 U.S.C. §921 (2012)).

This Court has addressed the intent of Congress in enacting the GCA. In enacting the provisions which are the subject of this case, Congress was concerned with the availability of firearms "to those whose possession thereof was contrary to the public interest." *Huddleston v. United States*, 415 U.S. 814, 824 (1974).

This Court has stated that Congress passed the GCA because of a:

> concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons. Its broadly stated principal purpose was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968). *See also* 114 Cong. Rec. 13219 (1968) (remarks by Sen. Tydings); *Huddleston v. United States*, 415 U.S., at 824-825. Congressman Celler, the House Manager, expressed the same concern: "This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons." 114 Cong. Rec. 21784 (1968); *Huddleston v. United States*, 415 U.S., at 828.

Barrett, 423 U.S. at 220. "The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.' S. Rep. No.

1501, 90th Cong., 2d Sess., 22 (1968)." *Huddleston*, 415 U.S. at 824.

Congressman Celler (whose bill, H.R. 17735, was a direct predecessor to the GCA) stated on the House floor that "[n]o one can dispute the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses, from buying, owning, or possessing firearms. This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons." 114 Cong. Rec. 13647 (1968).

Quoting this statement, this Court stated that Congress was concerned with "distinguishing between law-abiding citizens and those whose possession of weapons would be contrary to the public interest." *Huddleston*, 415 U.S. at 829. "The Act itself thus contemplates interference with the ownership of weapons when those weapons fall into the hands of juveniles, criminals, drug addicts, and mental incompetents." *Id.*

Congress did not intend to *carte blanche* prohibit what is commonly, and often pejoratively, referred to as "straw purchases" – the purchase of a firearm by an individual on behalf of another. This was explicitly recognized by BATFE. Until 1995, BATFE held the position that a purchase by a non-prohibited person for another non-prohibited person was lawful and did *not* constitute a straw purchase. *See infra* Part I.C.

The GCA "pointedly and simply provides that it is unlawful for four categories of persons, including a

convicted felon, 'to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.' The quoted language is without ambiguity. It is directed unrestrictedly at the felon's receipt of any firearm. . . ." *Barrett*, 423 U.S. at 216.

It is clear that Congress' intent was *not* to prevent transfers of firearms between persons who are *both legally entitled to purchase the firearm*. Rather, Congress desired to prevent individuals from purchasing firearms on behalf of prohibited persons.

"Congress knew the significance and meaning of the language it employed" in this section of the GCA. *Id.* at 217. "[T]here is no ambiguity in the words of §922(h) [the predecessor to §922(g)], and there is no justification for indulging in uneasy statutory construction. *United States v. Wiltberger*, 5 Wheat. 76, 95-96 (1820); *Yates v. United States*, 354 U.S. 298, 305 (1957); *Huddleston v. United States*, 415 U.S. 814, 831 (1974). *See United States v. Sullivan*, 332 U.S. 689, 696 (1948)." *Id.* Effect should be given to Congress' intent.

B. Form 4473 prohibits and criminalizes conduct that Congress did not prohibit.

The BATFE's use of Form 4473 conflicts with Congress' intent.

The BATFE has been authorized to enforce the GCA. The Attorney General has the authority to "prescribe only such rules and regulations as are

necessary to carry out the provisions of" the GCA. 18 U.S.C. §926(a).

"A licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any person, other than another licensee, unless the licensee records the transaction on a firearms transaction record, Form 4473. . . ." 27 C.F.R. §478.124(a).

Form 4473, which was not subject to notice and comment rulemaking, states that "[t]he information you provide will be used to determine whether you are prohibited under law from receiving a firearm." Bureau of Alcohol, Tobacco, Firearms and Explosives, ATF Form 4473 (5300.9), Part I (2012) (available at http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf).

Form 4473 has historically included a plethora of questions used to identify the transferee (including name, address, place of birth, height, weight, gender, birth date, SSN, and ethnicity) and questions used to determine whether or not the transferee was a prohibited person (listing the disqualifications set forth in §§922(d) and (g)).

However, in 1995, BATFE added a new question to Form 4473. *United States v. Dollar*, 25 F. Supp. 2d 1320, 1325 n.6 (1998). Question number 11.a now asks: "Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer**

the firearm(s) to you." ATF Form 4473, at 1 (emphasis original).

In the Definitions section appended to current Form 4473, the BATFE informs: "you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself. . . ." *Id.* at 4. The form then provides an example of a prohibited transaction: "Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer **"NO"** to question 11.a. The licensee may not transfer the firearm to Mr. Jones." *Id.*

If an individual purchasing a firearm on behalf of another answers "no" to Question 11.a, the sale will be denied by the FBI's NICS Center when the firearms dealer calls in to have the transfer approved. "If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." *Id.* at 1.

Thus, despite the fact that Congress never prohibited, nor intended to prohibit, the transfer of a firearm by one non-prohibited individual to another non-prohibited individual, Form 4473 prohibits such a lawful transfer.

Furthermore, if the transferee answers "yes" (indicating that he *is* the actual buyer) and then transfers the firearm to the other non-disqualified individual, he may be charged: (1) with a felony for violating §922(a)(6), for making a false statement

that is "material to the lawfulness of the sale," and/or (2) with a felony for violating §924(a)(1)(A), for knowingly making "any false statement or representation with respect to the information required . . . to be kept in the records" of a firearms dealer. 18 U.S.C. §922(a)(6) and §924(a)(1)(A).

This Court has stated that "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). Further, the Administrative Procedure Act forbids federal agencies from promulgating regulations "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §706(2)(C).

The intent and result of Question 11.a is to prevent a person who is legally entitled to purchase a firearm from purchasing a firearm on behalf of another person who is *also* legally entitled to purchase the firearm. This goes far beyond the intent of Congress to prevent transfers of firearms to persons who are prohibited under the GCA. Question 11.a criminalizes transfers between individuals who are not prohibited persons.

C. BATFE is inconsistent in its application of this non-statutorily authorized prohibition.

"The term 'straw purchase' is not defined in either the United States Code or the Code of Federal Regulations. It is in fact a judicially created doctrine. . . ." *Dollar*, 25 F. Supp. 2d at 1322.

BATFE's current position is contrary to the position it previously took. The government long advised gun buyers that the straw purchaser doctrine only applied when "the purchaser of record is merely being used to disguise the actual sale to another person, who could not personally make the purchase or is prohibited from receiving or possessing a firearm." *Id.*, at 1324 (quoting Federal Regulations of Firearms and Ammunition, ATF P 5300.12 (1980)).

BATFE first defined "straw purchaser" in its 1980 Industry Circular 79-10, stating that a purchase by a non-prohibited person for another non-prohibited person was lawful and did *not* constitute a straw purchase. *Dollar*, 25 F. Supp. 2d at 1323.

> The Gun Control Act of 1968 does *not* necessarily prohibit a dealer from making a sale to a person who is actually purchasing the firearm for another person. *It makes no difference that the dealer knows that the purchaser will later transfer the firearm to another person, so long as the ultimate recipient is not prohibited from receiving or possessing a firearm. . . .* What the Act forbids is the sale or delivery of a firearm to a person the

> licensee knows or has reason to believe is a person to whom a firearm may not be sold (e.g., a nonresident or a felon) or to a person the licensee knows will transfer the firearm to a person prohibited from receiving or possessing it.

Federal Regulations of Firearms and Ammunition, ATF P 5300.12, 24 (1980) (emphasis added).

BATFE's definition of "straw purchase" was not changed in subsequent ATF publications in 1984 and 1988. (Your Guide To) Federal Firearms Regulation 1984-85; (Your Guide To) Federal Firearms Regulations 1988-89.

Without any basis in law, BATFE changed its position and made what it previously asserted was a perfectly lawful act, into a new prohibition.

In *Polk*, the Fifth Circuit noted the change in BATFE's "straw purchase" warning on the reverse side of the August 1994 version of ATF Form 4473 and the April 1991 version. *United States v. Polk*, 118 F.3d 286, 295 n.7 (5th Cir. 1997). "The April 1991 warning states that a 'straw purchase' may violate federal firearms laws if the licensee knows and has reasonable cause to believe that the true purchaser of the firearm(s) is 'ineligible' to make that purchase directly." *Id.* In contrast, the Court noted that the August 1994 version of Form 4473 "significantly broadens the definition of 'straw purchase,'" by dispensing, for the first time, the requirement that the ultimate recipient be a prohibited person, by defining

it instead as occurring "when the actual buyer uses another person (the straw purchaser) to execute ATF Form 4473 purporting to show that the straw purchaser is the actual buyer." *Id.*

Furthermore, BATFE is inconsistent in the application of its new statutorily unauthorized prohibition. While Form 4473 now prohibits the transfer of firearms purchased by a non-prohibited person to another non-prohibited person in all cases, BATFE states that in some cases, such transfers are not prohibited.

Form 4473 states that "[i]f you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." ATF Form 4473, Question 11.a, at 1. However, in the Instructions portion of Form 4473, BATFE creates exceptions to this black letter rule:

> Question 11.a. Actual Transferee/Buyer: . . . you are the actual transferee/buyer if you are purchasing the firearm for yourself. . . . *You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party.* ACTUAL TRANSFEREE/BUYER EXAMPLES: Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is NOT THE ACTUAL TRANSFEREE/BUYER of the firearm and must answer "NO" to question 11.a. The licensee may not transfer the firearm to Mr. Jones. *However, if Mr. Brown goes to buy a firearm with his own money to give to Mr. Black as a present, Mr. Brown is the actual*

> *transferee/buyer of the firearm and should answer "YES" to question 11.a. . . .*

ATF Form 4473, "Notices, Instructions and Definitions," at 4 (emphasis added).

Thus, BATFE creates an exception to the prohibition for "gifts." Like the prohibition itself, this exception is not found anywhere in the GCA, and is created entirely by ATF Form 4473.

Furthermore, in the most recent edition of BATFE's Federal Firearms Regulations Reference Guide ("Reference Guide"), BATFE states, in pertinent part, in the Questions and Answers section: "(B14) May a parent or guardian purchase firearms or ammunition as a gift for a juvenile (less than 18 years of age)? Yes." Federal Firearms Regulations Reference Guide, ATF P 5300.4, Sec. IV.C, Question B-14,179 (2005). *See also*, Brief for Respondents in Opposition at 13, *NRA v. BATFE*, No. 13-137 (U.S. Nov. 15, 2013) ("Moreover, individuals between 18 and 20 may legally obtain handguns through avenues not prohibited by federal law, including by receiving gifts from their parents, who may purchase from FFLs. . . . *See* 18 U.S.C. §§921(a)(21)(C), 922(b)(1); ATF Form 4473.")

Thus, Mr. Brown can buy a firearm "with his own money to give to Mr. Black as a present," and a parent or guardian may purchase a firearm for a juvenile. However, in the instant case, purchasing a firearm for an uncle is a felony. There is no obvious difference why the law should treat these situations

differently, and there certainly is no statutory basis to treat them differently.

D. The discretion afforded an administrative agency is not unlimited, and does not include prohibiting and criminalizing conduct that Congress specifically chose not to criminalize.

While an administrative agency is afforded discretion, this discretion is not unlimited. Rules and regulations that comply with APA's rule making requirements, including notice and comment, are afforded a high level of deference. *See generally Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) (stating that such regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute). The framework of deference set forth in *Chevron* applies to an agency interpretation contained in a properly promulgated regulation. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). However, even in these cases, the deference is not absolute. *See generally Chevron.*

Form 4473 was not promulgated in compliance with APA's rule making requirements. Agency actions that are not subject to APA's rule making requirements are afforded a lesser deference. *See Reno v. Koray*, 515 U.S. 50, 61 (1995). Such agency actions are "entitled [only] to some deference." *Reno*, 515 U.S. at 61 (citing *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157, (1991)).

Agency interpretations, opinion letters, policy statements, agency manuals, enforcement guidelines, etc. do not warrant *Chevron*-style deference. *Christensen*, 529 U.S. at 587. They are "entitled to respect," but only to the extent that they are persuasive, which is not the case in relation to Question 11.a of Form 4473. *Id.*

For instance, Courts use a lower standard of deference when reviewing an administrative agency's interpretations. *See Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2443 n.4 (2013) and *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2533-34 (2013) (rejecting EEOC guidance manual's definitions).

This Court has cautioned that just because an agency believes that a statute should have included language to extend a 10-day trading suspension period, does not mean that the agency can extend this time. *SEC v. Sloan*, 436 U.S. 103 (1978). The suspension time "cannot be judicially or administratively extended simply by doubtful arguments as to the need for a greater duration of suspension orders than it allows. If extension of the summary suspension power is desirable, the proper source of that power is Congress." *Id.* at 117. "[H]ad Congress intended the Commission to have the power to summarily suspend trading virtually indefinitely we expect that it could and would have authorized it more clearly than it did in [the statute]. *Id.* at 122.

Likewise, if Congress had intended to prohibit the transfer of firearms between two non-prohibited persons, it would have added such a prohibition to §§922(d) and (g), but it did not. The validity of agency actions is especially important in a criminal case, such as this, which exposes a citizen to a felony conviction. BATFE exceeded its statutory authority by prohibiting, via Form 4473, that which Congress did not prohibit.

E. This Court has previously refused to read exclusions into the GCA.

This Court has rejected attempts to read into the GCA exclusions, to prohibited transfers, that are not found in the plain language of the GCA. "Had Congress' desire been to exempt a transaction of this kind, it would have artfully worded the definition so as to exclude it." *Huddleston*, 415 U.S. at 822.

To the same extent that an exclusion should not be read into the GCA prohibition, BATFE should not be allowed to add a new prohibition into the GCA that does not exist. "[T]here is nothing else in the statute that justifies [such an] imposition." *Id.* at 820.

F. The Fifth and Ninth Circuits support the conclusion that Form 4473 conflicts with the plain intent of Congress.

The Fifth and Ninth Circuits support the conclusion that Form 4473 effectively prohibits transactions

that Congress did not intend to prohibit. *United States v. Polk*, 118 F.3d 286, 295 (5th Cir. 1997) and *United States v. Moore*, 109 F.3d 1456, 1460 (9th Cir. 1997).

In *Polk*, Davidson purchased firearms on behalf of Polk. Polk was charged with making false statements to a licensee in the acquisition of a firearm under 18 U.S.C. §922(a)(6). *Polk*, 118 F.3d at 291. Polk argued that the purchases "were not 'straw purchases' because Polk had every right to purchase firearms (i.e., he was not an unlawful purchaser through Davidson)." *Id.* at 295. The Government argued, however, that "Davidson's purchases were 'straw purchase' transactions because, notwithstanding the fact that Polk could lawfully purchase firearms, Davidson falsely informed a federally licensed firearms dealer that he was the true purchaser of the weapons." *Id.*

The Fifth Circuit held that "the Government's construction of §922(a)(6) sweeps too broadly. . . ." *Id.*

The Court admitted that it had previously held that straw purchases may violate §922(a)(6). "Although §922(a)(6) on its face does not prohibit 'straw purchases,' we have nonetheless held that such transactions violate §922(a)(6). *See, e.g., United States v. Ortiz-Loya*, 777 F.2d 973, 979 (5th Cir. 1985)." *Id.* at 295. However:

> It is clear to us – indeed, the plain language of the statute compels the conclusion – that § 922(a)(6) criminalizes false statements that

> are intended to deceive federal firearms dealers with respect to facts material to the 'lawfulness of the sale' of firearms. . . . Thus, *if the true purchaser can lawfully purchase a firearm directly, §922(a)(6) liability* (under a 'straw purchase' theory) *does not attach*.

Id. (emphasis added).

The Court also admitted that it had previously held that "the mere making of a false statement on ATF form 4473 triggers §922(a)(6) liability." *Id.* n.8. Again the Court distinguished:

> However, these cases do not compel a different result here because *in each of those cases, the person signing the form was a convicted felon and lied about that fact*. In other words, the defendants' failure to state that they were convicted felons made the sale unlawful. *By contrast, in this case, it is undisputed that CI Davidson could have lawfully purchased weapons from a federally licensed firearms dealer*.

Id. (emphasis added).

In *United States v. Moore*, the Ninth Circuit also held the view that the "straw purchase" of a firearm, where both individuals are not disqualified and could lawfully have purchased the firearm, does not violate §922(a)(6). 109 F.3d at 1461. *See also Perri v. Department of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981) (a "strawman" purchase occurs "when a lawful purchaser buys for an unlawful one").

In *Moore*, the government argued that defendant Wiley engaged in a strawman purchase of a firearm on behalf of a prohibited minor. *Moore*, 109 F.3d at 1460. The issue was whether Wiley had purchased the firearm on behalf of the minor, Bobby Moore, or on behalf of Moore's mother, Mary Moore, who was not a prohibited minor.

The Ninth Circuit reasoned that the "strawman" doctrine was "nothing more than a long-standing construction of the relevant statutes," and that "a person violates section 922(a)(6) by acting as an intermediary or agent of someone who is ineligible to obtain a firearm from a licensed dealer and making a false statement that enables *the ineligible principal* to obtain a firearm." *Id.* at 1460-61 (emphasis added). "[S]ham or strawman purchases occur when a lawful purchaser buys for an unlawful one." *Id.* (quoting *Perri v. Department of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981) (internal citations omitted). *See also United States v. Lawrence*, 680 F.2d 1126, 1127-28 (6th Cir. 1982) (defendants who purchase firearms for ineligible foreign citizens violate section 922(a)(6)); *United States v. Howell*, 37 F.3d 1197, 1202 (7th Cir. 1994) (the essence of a straw purchaser case is "an eligible purchaser who is acting as an agent, intermediary, or straw purchaser for someone who is ineligible to purchase the firearm directly").

The Court quoted with approval the District Court's statement that "Wiley was an archetypical straw man. He was recruited and compensated for his role because Bobby could not buy the coveted

firearm. . . ." *Moore*, 109 F.3d at 1462. Because Moore, as a juvenile, was a prohibited person under federal law, Wiley would be making the purchase on behalf of a prohibited person; and preventing purchases on behalf of prohibited persons *was* Congress' intent in passing the GCA. *Id.* at 1462-63.

Thus, while the Ninth Circuit affirmed the conviction, like the Fifth Circuit, it holds that §922(a)(6) does not apply to straw purchases where the ultimate recipient of the firearm is not prohibited.

Unlike *Moore*, neither Bruce Abramski nor his uncle were prohibited persons under the GCA. Yet Abramski was indicted by the government because he purchased a firearm on behalf of his uncle.

The Fifth Circuit in *Polk* and the Ninth Circuit in *Moore* and *Perri* all demonstrate that criminalizing such a transfer flies in the face of the Congressional intent (*supra* Section I.A.) of the GCA. However, the Fourth Circuit rejected the reasoning of the Fifth and Ninth Circuits, and upheld Abramski's conviction, despite the plain evidence that Congress' intent was not to criminalize the purchase of a firearm by a non-prohibited person on behalf of another non-prohibited person.

The Fourth Circuit joined the Sixth and Eleventh Circuits in rejecting the reasoning of *Polk* and *Moore*. *See United States v. Morales*, 687 F.3d 697, 701 (6th Cir. 2012) and *United States v. Frazier*, 605 F.3d 1271, 1281 (11th Cir. 2010). There exists a split of authority

on whether a felony is committed when a non-prohibited person purchases a firearm for another non-prohibited person. The Fourth Circuit's ruling in the case below exposes well intentioned citizens, who are not prohibited persons, to the danger of felony prosecution, for conduct that Congress did not criminalize.

II. THE ACTUAL BUYER POLICY WAS PROMULGATED WITHOUT NOTICE AND COMMENT IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT.

Even if this Court were to conclude that the actual buyer policy is consistent with a permissible construction of the GCA, "agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). The actual buyer policy is a legislative rule. The Administrative Procedure Act, 5 U.S.C. §500 *et seq.* ("APA") requires that legislative rules be promulgated via notice and comment rule making procedures. Because the actual buyer policy was not promulgated in accordance with those procedural requirements, it is invalid.

A. The APA requires notice and comment rule making.

The APA establishes procedures that agencies must use in enacting rules, 5 U.S.C. 553 (LEXIS through P.L. 113-18), which are defined as, "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." *Id.* 551(4).

B. The actual buyer policy does not qualify for any exception to the notice and comment requirements.

Agencies may avoid notice and comment procedures for rules relating to "military or foreign affairs" functions or "agency management or personnel or to public property, loans, grants, benefits, or contracts," 5 U.S.C. §553(a), or when the agency finds with good cause that notice and comment would be, "impracticable, unnecessary, or contrary to the public interest." 553(b)(B). In the latter case the agency must publish its finding and a statement of its reasons in the rule, *id.*, which BATFE has not done that here. It seems clear that none of the other aforementioned exceptions apply in the instant case.

C. The actual buyer policy is not an interpretive rule, general statement of policy, or rule of organization or procedure.

Section 553 of the APA also excludes from the notice and comment requirement, "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," 5 U.S.C. §553(a)(A). These are "non-legislative rules." Rules that fall into none of the exceptions are subject to notice and comment rule making and are commonly referred to as legislative or "substantive" rules. Although "'substantive rule' is not defined in the APA, and other authoritative sources essentially offer definitions by negative inference," this Court has "described a substantive rule – or a 'legislative type rule' – as one 'affecting individual rights and obligations.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979) (internal citations omitted).

As an initial matter, rules of "organization, practice, or procedure" are internal rules that do not "substantially affect the rights of those over whom the agency exercises authority." *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974). Clearly, the actual buyer policy – which regulates FFLs and transferees, and can result in their criminal prosecution or (in the case of FFLs) license revocation – is no mere internal rule.

The Attorney General's Manual on the Administrative Procedure Act (AG's Manual) has been described as, "the Government's own most authoritative interpretation of the APA," which this Court has

"repeatedly given great weight." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218-219 (1988) (Scalia, J., concurring) (internal citations omitted). It defines several key terms as follows:

> Substantive rules – rules, other than organizational or procedural under section 3(a)(1) and (2), issued by an agency pursuant to statutory authority and which implement the statute. . . . Such rules have the force and effect of law.
>
> Interpretative rules – rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. . . .
>
> General statements of policy – statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.

Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993), quoting AG's Manual at 30 n.3 (1947).

Interpretative rules "merely restate or explain the preexisting legislative acts and intentions of Congress." Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?* 41 Duke L.J. 1312, 1324 (1992) (citations omitted). In *American Mining Congress*, the D.C. Circuit considered Program Policy Letters ("PPLs") issued without notice and comment by the Mine Safety and Health Administration ("MSHA"). MSHA

had previously enacted regulations requiring affected parties to report "diagnoses" of certain occupational illnesses. The disputed PPLs established standards for determining when chest x-rays constituted "diagnoses." 995 F.2d at 1107-1108. The *American Mining Congress* court laid out the following test for determining whether a rule is legislative and is therefore subject to notice and comment requirements:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

Id. at 1112. An affirmative answer to any of these questions indicates a legislative rule. This approach has been favorably cited or outright followed, in whole or in part, by numerous federal appellate courts. *See, e.g.*, *Sweet v. Sheahan*, 235 F.3d 80, 91 (2d Cir. 2000); *Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary*, 93 F.3d 103, 113 (3d Cir. 1996); *West Virginia v. Thompson*, 475 F.3d 204, 211 n.2 (4th Cir. 2007); *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996); *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1088 (9th Cir. 2003); *Mission Group Kan. v. Riley*, 146 F.3d 775, 784 (10th Cir. 1998).

American Mining Congress concluded that the PPLs were merely interpretive rules. The MSHA had neither published them in the Code of Federal Regulations, nor invoked its legislative authority in issuing them. The PPLs merely required reporting of certain x-ray results that were "surely equivalent, in normal terminology, to a diagnosis"; thus the PPLs neither repudiated nor were irreconcilable with the prior regulation. 995 F.2d at 1113. The Court concluded that, even absent the PPLs, there would have been sufficient legislative basis for agency action by virtue of pre-existing regulations regarding reporting of diagnoses.

American Mining Congress distinguished earlier cases that inquired whether a disputed rule had "binding effect," explaining that this analysis was useful for determining whether a rule was an exempt general policy statement, but not whether it was an interpretive rule. *Id.* at 1111.

An important case in this vein was *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974), which involved a Policy Statement, issued by the Federal Power Commission without notice and comment, establishing priorities for pipeline owners in delivering natural gas during shortages. The Policy declared the Commission's intent to adhere to the priority schedule except in cases of individualized showings by pipeline companies that a different plan would be "more in the public interest." *Id.* at 36. Holding that the Policy Statement was a general statement of policy, the

Court reasoned that a substantive rule "establishes a standard of conduct which has the force of law" and generally cannot be challenged in subsequent administrative proceedings. *Id.* at 38. In contrast, a general policy statement merely "announces the agency's tentative intentions for the future. [And w]hen the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." *Id.* Since the Policy Statement disclaimed any intent to establish a binding rule, expressed an intent to permit parties to challenge the underlying policy, and "expressly envision[ed] further proceedings," the court held that it was a statement of general policy and not a substantive rule. *Id.* at 40.

The Court applied a similar, but retrospective, test in *United States Telephone Association v. Federal Communications Commission*, 28 F.3d 1232 (D.C. Cir. 1994), in which the D.C. Circuit set aside a schedule of monetary penalties for Communications Act violations. The FCC argued that the schedule was a statement of policy. The court reasoned that, "the distinction between [substantive rules and statements of general policy] . . . turns on an agency's intention to bind itself to a particular legal policy position." *Id.* at 1234. Relying heavily on the fact that the schedule had been applied "in over 300 cases and only in 8 does the Commission even claim that it departed from the schedule," the court concluded that the FCC intended to be bound by the penalty schedule. *Id.*

Applying these tests to BATFE's actual buyer policy compels the conclusion that that policy is a legislative rule.

1. The actual buyer policy is not an interpretive rule.

By the plain language of the Attorney General's Manual, the actual buyer policy cannot be an interpretive rule. Neither question 11.a of Form 4473, the associated notices or instructions, nor the statements published in the *Reference Guide* and *FFL Quick Reference Guide* purport to "restate" the language of any statute or rule. None of these reference a specific statute or regulation. The terms "straw purchase" and "actual buyer" and variants thereof do not appear in the GCA or in the Code of Federal Regulations. The aforementioned documents create the policy that only an "actual buyer" may receive a firearm from an FFL even when both the transferee and the actual buyer or ultimate recipient are lawfully entitled to possess firearms out of whole cloth.

2. The actual buyer policy is not a general statement of policy; it establishes a categorical rule.

Nor is the actual buyer policy a general statement of policy. Looking to the Attorney General's Manual, it is noteworthy that no statute grants BATFE any generalized "discretionary power" to prohibit previously lawful firearm transfers. *Pac. Gas*

& Elec. compels the same conclusion. No published expression of the actual buyer policy, whether in the Reference Guide, the FFL Quick Reference Guide, or on Form 4473, evinces an intent by BATFE to permit case-by-case challenges to the policy in subsequent administrative proceedings. *Pac. Gas & Elec.*, 506 F.2d at 40. The policy is no mere "statement of tentative intentions for the future." *Id.* at 38. For example, nothing in the policy suggests that an FFL who knowingly transfers a firearm to a transferee who answers "no" to question 11.a of Form 4473 could defend his license in a revocation proceeding by demonstrating that the ultimate recipient was not a prohibited person, and that the transferee and the ultimate recipient observed all requirements for lawful transfer of possession. Nothing in the policy appears to "envision further proceedings" at which its underlying basis may be challenged. *Id.* at 40. The actual buyer policy simply announces categorical rules, and categorical prohibitions based upon those rules. As the instant case demonstrates, FFLs and transferees completing Form 4473 must adhere to those rules without exception.

3. The actual buyer policy is a legislative rule, without which there would be no adequate legislative basis for enforcement.

There is no doubt that the actual buyer policy is a legislative rule in the sense that it "'affect[s] individual rights and obligations.'" *Chrysler Corp.*, 441

U.S. at 302 (1979). Absent the policy, a non-prohibited person wishing to purchase a firearm from an FFL for transfer to another non-prohibited person would be free to make the purchase (as was the case for many years under BATFE's prior practice), and the FFL would be free to make such a transfer even knowing that the purchaser was not the ultimate recipient (as was the case for many years under BATFE's prior practice). In short, the actual buyer policy is a legislative rule because "in its absence there would not be an adequate legislative basis," *Am. Mining Cong.*, 995 F.2d at 1112, for BATFE to prohibit an FFL from transferring a firearm to a middleman for ultimate delivery to a non-prohibited person, or for redefining straw purchases to include transfers to persons entitled to receive and possess firearms.

BATFE obviously knew when it implemented the actual buyer policy that it lacked "adequate legislative basis" for restricting transfers of firearms from FFLs to "actual buyers." Had BATFE believed it had an adequate legislative basis for enforcing such a rule, it could simply have repudiated Industry Circular 79-10 and begun prosecuting transferees who obtained firearms for transfer to non-prohibited persons. It did not do that. In order to bootstrap such activities into criminal offenses, it was necessary that BATFE add the actual buyer certification and the accompanying instructions to Form 4473, so that it could prosecute those purchasers making false statements. The fact that BATFE could not – and cannot – prosecute the transfers themselves, rather than the

making of false statements in connection with the transfers, speaks volumes about the lack of an adequate legislative basis for the actual buyer policy.

The actual buyer policy is procedurally invalid. It should have been promulgated by notice and comment rule making.

CONCLUSION

The actual buyer policy, in particular Question 11.a of Form 4473, exceeds statutory authority because it criminalizes the legal transfer of firearms between non-prohibited persons. There is no statutory authority for this prohibition and it violates the plain intent of Congress. Even if this Court concludes that the actual buyer policy is within BATFE's discretion, the policy is procedurally invalid because it was not issued through notice and comment rule making.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 12-1493

In The
Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

AMICI CURIAE BRIEF OF ROBERT SNELLINGS AND ULYSSES GRANT EARLY, IV IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

When a person buys a gun intending to later sell it to someone else, the government often prosecutes the initial buyer for making a false statement about the identity of the buyer that is "material to the lawfulness of the sale." These prosecutions rely on the court-created "straw purchaser" doctrine, a legal fiction that treats the ultimate recipient of a firearm as the "actual buyer," and the immediate purchaser as a mere "straw man."

1. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a fact "material to the lawfulness of the sale" of the firearm under 18 U.S.C. § 922(a)(6)?

2. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a piece of information "required . . . to be kept" by a federally licensed firearm dealer under 18 U.S.C. § 924(a)(1)(A)?

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I. INTEREST OF AMICI[1]

Amici ROBERT SNELLINGS (represented by attorney J. Goodwin) and ULYSSES GRANT EARLY, IV (represented by attorney D. Kilmer) are co-defendants in a criminal case pending in the United States District Court for the Eastern District of California, *United States v. McGowan, et. al.*, Case No.: 2:12-CR-0207, the Honorable Troy L. Nunley presiding.

The *McGowan* case was set to begin a jury trial on or about December 2, 2013 when the petition for certiorari in this case was granted on October 15, 2013. Judge Nunley made a finding that the facts and law were similar enough in both cases, that the trial in *United States v. McGowan, et. al.*, was continued pending the publication of the opinion in *United States v. Abramski*.

This brief urges this Court to reverse the decision of the Circuit Court, by repudiating or modifying the

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation and submission of this brief. Amicus curiae received financial assistance in the preparation and filing of this brief from the Calguns Foundation, Inc., a non-profit organization that supports and defends Second Amendment rights in California. Calguns Foundation, Inc., is incorporated under the laws of that state with its principal place of business in San Carlos, California and is not publicly traded. Petitioner filed a blanket consent for amicus curiae. Respondent's consent is submitted herewith.

"straw-man" theory of criminal liability, unless the government has been objectively deprived of its recording-keeping information to insure lawful sales and provide crime trace data for solving crimes. This requirement of objectivity is essential when courts are interpreting criminal statutes that touch on fundamental rights.

II. ARGUMENT SUMMARY

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the SECOND AMENDMENT rejoined the Bill of Rights to act as a guarantee that government policy must comport with the Constitution when its rules effect individuals seeking to exercise their "right to keep and bear arms."

It should not be controversial that acquisition or commerce in arms, like their possession is, should be protected by the SECOND AMENDMENT.

In *Andrews v. State*, 50 Tenn. 165, 8 Am. Rep. 8 (1871) – cited favorably in *Heller*, *at* 608, 614, 629 – the High Court of Tennessee found much in common between that State's guarantee of the "right to keep and bear arms" and the SECOND AMENDMENT when it held:

> The right to keep and bear arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and purchase and provide ammunition suitable for such arms, and keep them in repair. [...]
>
> *Andrews*, 50 Tenn. *at* 178, 8 Am. Rep. *at* 13

The federal government has regulated and/or taxed commercial sales of some firearms since the National Firearms Act (NFA) of 1934[2] and extended that regulation to all commercial sales with passage of the Gun Control Act (GCA) of 1968.[3] The Bureau of Alcohol, Tobacco, Firearms and Explosives currently administers a licensing scheme for commercial firearm dealers. Those dealers "engaged in the business" of commercial firearms sales are required to insure compliance with federal laws at the point of sale (i.e., forbidding sales to prohibited persons) and to keep inventory logs and other necessary paperwork to enable the tracing of firearms recovered at crime scenes. See generally: 18 U.S.C. Chapter 44 *et seq.*, 26 U.S.C. Chapter 53 *et seq.*, and enabling regulations found at 27 CFR Part 478 *et seq.*, and 479 *et seq.*, and 28 CFR Part 25 *et seq.*

Though the *Heller* opinion did not purport to disturb any "longstanding" laws imposing conditions and qualifications on the commercial sale of arms (*Id., at* 626), this Court did strike down a federal enclave's criminalization of conduct that clearly fell within the scope of the SECOND AMENDMENT.

The petitioner in *Abramski* and the defendants in *U.S. v. McGowan*, were similarly engaged in conduct

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[2] 72nd Congress, Sess. 2, Ch. 757, 48 Stat. 1236, enacted on June 26, 1934, currently codified as amended as I.R.C. Ch. 53

[3] Pub.L. 90–618, 82 Stat. 1213-2, enacted October 22, 1968.

that clearly falls within the scope of that amendment. They bought and sold firearms. They used a federally licensed dealer to facilitate all transactions. All parties to the transactions passed all background checks, completed all paperwork, adhered to all waiting periods and complied with all state laws in their local jurisdictions. No firearm was transferred in any transactions to any person for whom the federal government was not given written notice (through the licensed dealer) of all legally required information.

The subjective intent of a gun buyer who becomes a seller at a subsequent time cannot be criminalized when the subsequent transaction is also conducted through a licensed dealer. With such a holding, this Court can right the wrong against the *Abramski* petitioner and perhaps prevent an unnecessary trial on an erroneous legal theory in *U.S. v. McGowan*.

III. FACTS OF *U.S. v. McGOWAN*

Defendants EARLY and SNELLINGS are charged with Conspiracy to Make a False Statement With Respect to a Firearm Record. The indictment alleges that an unindicted co-conspirator, who was a police officer, bought a firearm on April 29, 2010 and that the transaction was conducted by SNELLINGS, a federally licensed firearm (FFL) dealer. This transaction was lawful under California Penal Code § 32000(b)(4).

The *McGowan* indictment further alleges that the police officer subsequently sold the same firearm to Defendant EARLY on May 27, 2010 in a private party transaction that is lawful under California Penal Code §§ 28050 and 32110(a).

The gravamen of the conspiracy charge is that the police officer, the FFL (SNELLINGS) and the civilian (EARLY) entered into an agreement to commit the unlawful act of making a false statement in connection with a firearm purchase in violation of 18 U.S.C. § 924(a)(1)(A), by having the police officer indicate that he was the actual buyer/transferee in response to Question 11.a., on ATF Form 4473 (5300.9).

In addition to an ATF Form 4473, the State of California requires a concurrent form for its records called a Dealer Record of Sale (DROS). See California Penal Code §§ 28100 - 28250. The government has produced, both of the ATF Form 4473s from the April 29, 2010 and the May 27, 2010 transactions and both of the California DROS from those transfers as part of pretrial discovery. These documents are evidence that both transactions complied with federal and state law. That the paperwork was complete and truthful and that all background checks and waiting periods were complied with.

The snare used to manufacture the conspiracy charge against EARLY and SNELLINGS is based on the theory that someone who intends to resell an object at some later time, is not a "transferee/buyer" at the time of initial acquisition.

IV. ARGUMENT

A. The Regulations Are Ambiguous

There are problems with the "strawman" theory of criminal liability that are set forth on the ATF From 4473 itself. At the top of the form is a notice:

> WARNING: You may not receive a firearm if prohibited by Federal or State law. This information you provide will be used to determine whether you are prohibited under law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. ¶¶ 921 *et seq.*, are punishable by up to 10 years imprisonment and/or up to a $250,000 fine.

However the ATF Form 4473 then offers a false choice to the gun buyer in question 11.a. when it asks: "Are you the actual transferee/buyer of the firearm(s) listed on this form?"

This raises a reasonable question about whether the conjunctive term including "transferee" broadens the definition of buyer. And this is assuming that the extraordinarily narrow definition of "buyer" implied by the "strawman" doctrine is constitutionally, statutorily and administratively sound.

Then page 2 of 6 of the ATF Form 4473 makes the mistake of substituting "buyer" for "transferee/buyer" in the verification above signature block #16 which itself is titled: "Transferee's/Buyer's Signature."

Furthermore on page 3 of 6 of the government's form under the title: Purpose of Form, the government reiterates that the 4473 is to insure the lawfulness of the transaction. In other words, its purpose is not to ensnare and criminalize transactions by ordinary persons through the use of hyper-technical legal definitions.

Finally, there is on page 4 of 6 of the 4473 a wholly incomplete, misleading and irrational definition of "Actual Transferee/Buyer."

In the present cases, each and every time the firearm changed hands there was a two-party transaction, and the federal and state paperwork, background check and waiting periods were all observed. Yet in its explanation of what constitutes a permissible three-party transaction, The United States Government contends that it is permissible for a Mr. Brown to buy a firearm from the FFL with his own money and then make a gift of the firearm to a Mr. Black, and thus lawfully answer "YES" to Question 11.a., provided Mr. Brown has no reason or cause to believe Mr. Black is prohibited under 18 U.S.C. § 922(g), (n) or (x).

The United States Government makes other statements to the gun-buying public that are contrary to their "strawman" theory of criminal liability.

The Bureau of Alcohol, Tabacco, Firearms and Explosives, puts out a publication: "FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE, ATF Publication 5300.4, Revised September 2005." It is available on the ATF website at: http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf.

Among other references to federal law, this Reference Guide contains letter rulings and FAQs relating to firearms laws and various permutations of firearm transactions. Relevant to this case, from page 196 (the pdf copy may be different) of the bound version of that publication, is the following FAQ:

(P60) An organization without a firearms license wishes to acquire a firearm from a licensee for the purpose of raffling the firearm at an event. How does the licensee comply with the Brady law?

[Answer] The licensee must comply with the Brady law by conducting a NICS check on the transferee. If the licensee wishes to transfer the firearm to the organization, a representative of the organization must complete a Form 4473 and a NICS check must be conducted on that representative prior to the transfer of the firearm. Alternatively, if the licensee transfers the firearm directly to the winner of the raffle, the winner must complete a Form 4473 and a NICS check must be conducted on the raffle winner prior to the transfer. Please note, if the organization's practice of raffling firearms rises to the level of being engaged in the business of dealing in firearms, the organization must get its own Federal firearms license (and the examples below would not apply).

Example 1: A licensee transfers a firearm to the organization sponsoring the raffle. The licensee must comply with the Brady Law by requiring a representative of the organization to complete the Form 4473 and undergo a NICS check. As indicated in the instructions on the Form 4473, when the buyer of a firearm is a corporation, association, or other organization, an officer or other representative authorized to act on

behalf of the organization must complete the form with his or her personal information and attach a written statement, executed under penalties of perjury, stating that the firearm is being acquired for the use of the organization and the name and address of the organization. Once the firearm had been transferred to the organization, the organization can subsequently transfer the firearm to the raffle winner without a Form 4473 being completed or a NICS check being conducted. This is because the organization is not an FFL. However, the organization cannot transfer the firearm to a person who is not a resident of the State where the raffle occurs and cannot knowingly transfer the firearm to a prohibited person.

Example 2: The licensee or his or her representative brings a firearm to the raffle so that the firearm can be displayed. After the raffle, the firearm is returned to the licensee's premises. The licensee must complete a Form 4473 for the transaction and must comply with the Brady Law prior to transferring the firearm to the winner of the raffle. If the firearm is a handgun, the winner of the raffle must be a resident of the State where the transfer takes place, or the firearm must be transferred through another FFL in the winner's State of residence. If the firearm is a rifle or shotgun, the FFL can lawfully transfer the firearm to the winner of the raffle as long as

> the transaction is over-the counter and complies with the laws applicable at the place of sale and the State where the transferee resides.
>
> Example 3: If the raffle meets the definition of an "event" at which the licensee is allowed to conduct business pursuant to 27 CFR 478.100, the licensee may attend the event and transfer the firearm at the event to the winner of the raffle. As in Example 2, the FFL must complete a Form 4473 and comply with the Brady law and the interstate controls in transferring the firearm.
>
> Please note, procedures used in Examples 2 and 3 ensure that the winner is not a prohibited person and that there is a record of the final recipient of the firearm in the raffle. [18 U.S.C. 922(t) and 922(a)(1)(A)]

In other words, the United State Government admits that its Form 4473 does not cover all possible permutations of how guns are marketed and sold, and therefore concedes that its definition of "buyer/transferee" is wide open to interpretation.

The purpose of the 4473 in commercial firearm sales should be to insure that the final recipient of a firearm is "not a prohibited person" and "that there is a record of the final recipient of the firearm" to assist in tracing crime guns. [Amici are not challenging the prosecution of persons who act as an intermediary or "strawman" for a prohibited person who cannot pass a background check or lawfully own guns.]

That is exactly what happened in the *Abramski* and *McGowan* cases. There is not an indictment's worth of difference between the way the government alleges the transactions occurred in these case and the way they can occur, with the government's blessings in the "gift" example printed on the Form 4473 and in the Reference Guide's "raffle" example.

B. The Regulations Do Not Provide Adequate Notice

Another implication of the "strawman" theory of liability based on such a narrow definition of buyer is that it does not provide adequate notice of criminal conduct, especially when a fundamental right is at stake.

The "strawman" theory says that if a buyer had formed the intent, at the time he signed the Form 4473, to later resell the firearm, he doesn't qualify as a "buyer/transferee" and thus makes a false statement in connection with the purchase of a firearm if he answers "Yes" to Question 11.a. This is not supported by the current state of the law.

18 U.S.C. § 921 *et seq.*, sets forth the statutory definitions to be used in connection with Chapter 44 of Title 18. Nowhere in those definitions is the term "buyer/transferee" defined. For that matter, neither are the terms "buyer" or "transferee" defined as separate terms.

The closest we get to a hint of the statutory definition of transferee is at 18 U.S.C. § 922(t)(1)(C) which requires the transferor to verify the identity of the transferee with a photo ID.

Title 27 CFR Chapter II, Part 478 contains the administrative rules for interpreting the congressional statute. Subpart B sets forth the definitions at § 478.11. (This is set forth in the Reference Guide starting on page 33.) Nowhere in that list of definitions is the term "buyer/transferee" defined. Nor for that matter, are the terms "buyer" or "transferee" defined as separate terms.

The closest the statutes and regulations come to identifying what constitutes a "transferee" is under Title 27 CFR Chapter II, Part 479 – Machine Guns, Destructive Devices, and Certain Other Firearms. But these are the regulations for interpreting Title 26 U.S.C. Chapter 53 of the Internal Revenue Code otherwise known as the National Firearms Act, which regulates – among other things – machine guns, saw-off shotguns and silencers. The relevant part of that identification and/or definition (actually a test) states that: "*[A] certifying official has no information indicating that the receipt or possession of the firearm would place the transferee in violation of State or local law or that the transferee will use the firearm for other than lawful purposes.*" 27 CFR § 479.85.

With the "strawman" theory riding on a definition of "buyer/transferee" – one would think that the government could produce a statutory/regulatory definition of the term that would give constitutionally significant notice of what is and is not included in that definition. Because with all the objective actions taken by the parties (proper forms filled out, background checks performed, waiting periods observed, etc...) this "strawman" doctrine is really just a "thought crime" that should be impermissible under our Constitution.

C. Sales to the Law-Abiding, Conducted Through an FFL Cannot Be a Crime

Where an indictment fails to allege an element, it fails to state an offense. *United States v. Wylie*, 919 F.2d 969, 972 (5th Cir. 1990); *United States v. Pupo*, 841 F.2d 1235, 1239 (4th Cir. 1988). An indictment also fails to state an offense when the facts alleged fall beyond the scope of the relevant criminal statute as a matter of statutory interpretation. *United States v. Hediathy*, 392 F.3d 580, 587 (3rd Cir. 2004). Under Ninth Circuit law, the omission of an element of the offense is grounds for automatic reversal. *United States v. Omer*, 395 F.3d 1087, 1088 (9th Cir. 2005).

The government's "strawman" theory is that any gun buyer with the intent to later resell that firearm, cannot be a "buyer/transferee" at the time of his initial acquisition and therefore makes a false statement with respect to a firearm record if he answers "Yes" to Question 11.a. – even if the subsequent sale was conducted through an FFL. (Presumably with all background checks, record keeping requirements and waiting periods.)

In a recent case, the Ninth Circuit insists that context is important.

> [T]he statute limits the types of falsehoods that are actionable to those that relate to information required under law to be kept by federally licensed firearms dealers. It makes sense that Congress would wish to ensure the accuracy of all the information that firearms dealers must keep as part of

> their permanent records, whether or not that information relates to the lawfulness of the ultimate sale. There is testimony that the accuracy of the information contained on Form 4473, including the name and address of the actual buyer, is of paramount importance to investigators when tracing weapons used in violent crimes.
>
> *United States v. Johnson*, 680 F.3d 1140 (9th Cir. 2012).

With the exception of the government's obtuse reading of Question 11.a., there are no allegations in *Abramski* (or the *McGowan* indictment), that the 4473s contained false statements or that any person who was prohibited acquired a firearm during the first or second transactions. There can be no crime under 18 U.S.C. § 924(a)(1)(4) because the government was never deprived of any of the data required by the federal record-keeping requirements. In other words, if the statements (address, legal status, eligibility, etc...) on the 4473 were accurate each time the gun was bought and sold, it is only the government's creative interpretation of the term "buyer/transferee" that even gets this case to a grand jury.

As noted above, there is no statutory/regulatory definition of the term "buyer/transferee" that is sufficient to put any sane person on notice that their liberty is at stake if they apply this definition wrong.

Second, it is just as reasonable to assume that "buyer/transferee" includes "buyer for later resale" as it is to assume that "buyer/transferee" excludes "buyer

for later resale" in the absence of a statutory and/or regulatory definition.

Third, without a statutory/regulatory definition of "buyer/transferee" the government should be bound by the common-law or state definition of such a term. For example, California Civil Code § 3445(c) defines "Transferee" as "the person to whom property was transferred or an obligation was incurred, or the successors or assigns of the person." California's Uniform Commercial Code § 2103(1)(a) defines "buyer" as "a person who buys or contracts to buy goods."

Similar California definitions of buyer and/or transferee can be found in California's statutory and case law. None of them preclude a buyer from being a reseller at a later time. A gun buyer's subjective intent at the time of the first purchase should be irrelevant as long as the information he conveyed was accurate at the time of the initial sale for that gun.

Take for example the scenario described on the 4473 itself relating to Mr. Brown buying Mr. Black a gun as a gift. In that transaction, the government is deprived of the data it needs as part of the federal record-keeping requirements.

All Mr. Brown needs, is to be ignorant of Mr. Black's criminal status for him to hand the gun over to Mr. Black as a gift. Furthermore the tracing data available to any future law enforcement investigation stops with Mr. Brown's 4473 information. The government is actually in a worse position relating to that transaction described on their own form as perfectly lawful, than they are in the *Abramski* and *McGowan* cases.

Take for (another) example the situations described for auctions or raffle drawings in the Reference Guide at page 196. The government blesses the first transaction that includes statements on the 4473 by that "buyer/transferee" who is running the auction/raffle, even though that person knows that they will not ultimately end up with the gun. What makes that set of transactions copacetic is the second set of records that are created. The second 4473 insures that the second transferee is eligible and creates the trace data necessary for law enforcement.

These transactions, sanctioned by the government's own publications, are indistinguishable from what is described as a crime in the *Abramski* and *McGowan* cases.

D. The Vague/Ambiguous "Strawman" Doctrine Violates a Fundamental Right

The government's interpretation of "buyer/transferee" as it relates to 18 U.S.C. § 924(a)(1)(A) is overbroad because it criminalizes conduct associated with a constitutionally protected right. That right is to acquire (keep and bear) arms. SECOND AMENDMENT. See generally: *Broadrich v. Oklahoma*, 413 U.S. 601 (1973).

Furthermore prosecutions under this theory are likely to have a chilling effect on private party sales if the gun buying public begins to believe that a misinterpretation of some fine-print, boiler-plate language on a government form could land them in federal prison. This chilling effect may also have the

unintended consequence of driving the private gun sales market underground and away from licensed dealers.

The government's interpretation of "buyer/transferee" is vague because it – "[...] leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

A law or definition may also be invalid because "[I]t fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Colautti v. Franklin*, 439 U.S. 379 (1979) (quoting *United States v. Harriss*, 347 U.S. 612 (1954)).

The rationales of the vagueness doctrine as it relates to fundamental rights are set forth in *Grayned v. City of Rockford*, (1972) 408 U.S. 104 at 108-09:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy

> matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

The government's irrational and contradictory definition of "buyer/transferee" promulgated by the "strawman" doctrine in these cases will have a chilling effect on the gun-buying public's SECOND AMENDMENT rights.

V. CONCLUSION

This Court should apply some form of heightened scrutiny to criminal law statutes that impact fundamental rights.

But even if the "strawman" doctrine did not threaten the "right to keep and bear arms" it is still irrational and constitutionally suspect when applied to circumstances where the government is charging a crime and it has not objectively been deprived of a gun buyer's prohibited party status and/or any record-keeping information to facilitate law enforcement's ability to trace firearms used in crimes.

The *Abramski* conviction should be reversed and this Court must further define or repudiate the "strawman" doctrine.

Respectfully Submitted on December 3, 2013,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR., *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Brief *Amicus Curiae* of Congressman Steve Stockman, Former ATF Assistant Director Robert E. Sanders, Gun Owners Foundation, U.S. Justice Foundation, Gun Owners of America, Inc., Institute on the Constitution, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, Policy Analysis Center, Oregon Firearms Federation, and Virginia Citizens Defense League in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Congressman Steve Stockman represents the 36th Congressional District of Texas in the U.S. House of Representatives. Robert E. Sanders is the former Assistant Director of Criminal Investigation for the Bureau of Alcohol, Tobacco, and Firearms.

Gun Owners Foundation, U.S. Justice Foundation, Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, Downsize DC Foundation, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and are public charities. Gun Owners of America, Inc., Abraham Lincoln Foundation, and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

The organizational *amici* were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

rights secured by law, including the defense of the rights of crime victims, the Second Amendment and individual right to acquire, own, and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this Court and other federal courts.

Oregon Firearms Federation and Virginia Citizens Defense League are state firearms advocacy groups.

All of these groups and individuals filed an *amicus curiae* brief in this case in support of the Petition for Writ of Certiorari on July 25, 2013.[2]

SUMMARY OF ARGUMENT

At issue in this case is the legality of the Government's current "straw purchase" doctrine as stated on the ATF Form 4473, and as enforced by prosecutions of firearms purchasers based on the prohibitions against making false statements in violation of 18 U.S.C. Sections 922(a)(6) and 924(a)(1)(A).

The current ATF Form 4473 states that a firearms purchaser cannot receive a firearm from a federal firearms licensee unless the "transferee" is the "actual buyer," and that to be the "actual buyer" he must use his own funds either to buy the firearm for himself or as a gift for another. If the transferee is using the funds of another person to purchase a firearm for

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[2] http://lawandfreedom.com/site/firearms/Abramski_Amicus.pdf.

another, then according to the Form the transfer is not permitted.

There is, however, neither statute nor regulation that prohibits such a transfer. To the contrary, 18 U.S.C. Section 922(d) prohibits only those transfers that the transferor knows or has reason to believe that the transferee is ineligible to receive a firearm. By requiring a firearms transferee to state on the ATF Form 4473 that he is the "actual buyer," the Government has created out of whole cloth new offenses based on the prohibition of false statements in Sections 924(a)(1)(A) and 922(a)(6).

To establish a violation of Section 924(a)(1)(A), however, the Government is required to demonstrate that a statutory provision of Chapter 44, Title 18, United States Code "requires" a licensed dealer to identify the "actual buyer" of a firearm and to keep that identification as part of his records. But there is no statute containing any such requirement. Rather, the relevant statutes (and regulations) require the FFL to identify only the person who is the "transferee" of a firearm. As for a violation of Section 922(a)(6), the Government has misused its straw purchase doctrine to secure a conviction without any evidence that Abramski intended to deceive, or even deceived, any person by his statement on the Form 4473.

In sum, the Government secured the false statement convictions in this case because its straw purchase doctrine invites arbitrary prosecutions of firearm purchasers that have no basis in law. Additionally, that doctrine imposes unworkable

burdens upon licensed firearm dealers that are inconsistent with the Congressional policy providing for a rapid background check to facilitate the transfer of firearms.

ARGUMENT

U.S. v. Abramski was not only an unjust conviction, it was an absurd prosecution. There is no other way to describe it. Abramski was eligible under federal, state, and local laws to possess firearms. *Id.*, 706 F.3d 307, 311. He went to a gun store, passed a background check, and bought a firearm. *Id.* He then took the firearm to another gun store, where his uncle — also eligible to possess firearms — passed a background check, and then received the firearm. *Id.* Both Abramski and his uncle were eligible persons, each having passed federal background checks. Neither attempted to evade any part of any law. In fact, Abramski consulted multiple FFLs to make sure everything was done "by the book." *Id.* *See also* Brief of Petitioner ("Pet. Br.") at 11; Brief for the United States in Opposition to Petition for Writ of Certiorari ("Opp. Br.") at 2.

Notwithstanding the foregoing, Bruce Abramski now inexplicably stands convicted as a felon, having violated the so-called "straw purchase" **doctrine** — a legal construct created by an overzealous administrative agency, employed by cooperative prosecutors, and sanctioned by deferential courts, but not an actual crime enacted by Congress or even by administrative regulation. Pet. Br. at 6. To devise a

crime, the Government has lit upon 18 U.S.C. Section 922(a)(6), which requires as an element a statement that is "intended or likely to deceive" an FFL. Yet none of Abramski's answers was intended to deceive anyone — nor did those answers deceive anyone. Rather, Abramski explained exactly what he was doing to each FFL with whom he dealt, in order to be assured that he was following the law. And each FFL agreed that the sale was lawful. *See* Pet. Br. at 11.

I. THE IDENTITY OF THE "ACTUAL BUYER" IS NOT INFORMATION AN FFL IS REQUIRED BY LAW TO OBTAIN AND RETAIN.

In its Brief in Opposition to the Abramski petition for a writ of certiorari, the Government represented to this Court that "all of the information on ATF Form 4473 is information that is required to be kept in the records of a federal firearms dealer." Opp. Br. at 15. Rather than join issue with Petitioner on the lawfulness of the "actual buyer" question on the Form 4473,[3] this Government response is nothing more than a diversionary tautology — that all of the information on the Form is information ATF requires the FFL to keep because ATF requires the FFL to keep the Form in its records.

Additionally, in its opposition brief, the Government asserts that the Form 4473 "requires the purchaser to certify that he is the actual buyer as part

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[3] *See* Petition for a Writ of Certiorari at 19-21.

of the dealer's collection of the name and other identifying information of the purchaser." *Id.*, at 16. Thus, the Government argues that Abramski was rightfully convicted under 18 U.S.C. § 924(a)(1)(A), having misrepresented on the ATF Form 4473 that he was the "actual buyer" when, in fact, the actual buyer was his uncle. *See Id.* But again, the Government's response is circular, focusing only on what the Form 4473 requires, while conveniently ignoring the issue of lawful authority for the actual buyer question on the Form 4473.

Such omissions are especially troublesome, as Congress expressly required that prosecutions be based only on a false statement "with respect to information **required by this chapter** to be kept...." 18 U.S.C. Section 924(a)(1)(A) (emphasis added). In seeking to preserve its conviction, the Government repeatedly ignores Abramski's true claim, and fails to identify any specific statutory provision in the United States Code that requires such information identifying the "actual buyer," to be kept by an FFL.

Rather than providing necessary textual support for its proposition that the ATF Form 4473 properly requires an FFL to keep records of the identity of the "actual buyer," the Government simply lists a number of supposedly supporting authorities: (A) 18 U.S.C. § 922(b)(5); (B) 18 U.S.C. § 923(g)(1); (C) 27 C.F.R. § 478.124(a) and (b); and (D) a trio of court of appeals opinions,[4] as if the answer to the question were self-

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[4] United States v. Johnson, 680 F.3d 1146 (9th Cir. 2012); United States v. Soto, 539 F.3d 191 (3d Cir. 2008), *cert. denied*, 555 U.S.

evident. *See id.* at 15-16. However, not one of these cited authorities supports the Government's position that the name of what it calls the "actual buyer" of a firearm is "information required by [Chapter 44 of Title 18, United States Code] to be kept" by an FFL.

A. 18 U.S.C. Section 922(b)(5) Does Not Require an FFL to Keep Records of a Principal on Whose Behalf a Buyer May Be Purchasing a Firearm.

Section 922(b)(5) provides that "it shall be unlawful for any licensed ... dealer to sell or deliver ... any firearm ... to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person, if the person is an individual...." Thus, "person," as it appears in Section 922(b)(5), is singular, and clearly means the human being who is physically present at the point of transfer, to whom the FFL delivers the firearm.

This reading comports with the ordinary meaning canon of statutory construction. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts ("Reading Law"), p. 69 (West: 2012).[5] In

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1116 (2009); and United States v. Nelson, 221 F.3d1206 (11th Cir. 2000), *cert. denied*, 531 U.S. 951 (2000).

[5] *See also* 1 James Kent, Commentaries on American Law 432 (Claytor's 1st ed: 1826) ("The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense.").

the ordinary course of business, a licensed dealer would not make inquiry as to what a purchaser will eventually do with a firearm — whether the person in the store is buying the firearm to give to or sell to another person, or whether the purchaser is buying the gun on behalf of a person who is not physically present.[6] There is nothing whatsoever in Section 922(b)(5) requiring the FFL to determine whether the firearm will or could be transferred later to another person, or whether the person who is the transferee is using his own money or the money of another to purchase the firearm for that other person.

Nor does Section 922(b)(5), by implication, impose upon an FFL any burden to make any such inquiry. To construe Section 922(b)(5) otherwise would be to violate the canon of construction that "[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*)." Reading Law at p. 93. It is not within the judicial power for judges to speculate, and then to fill up any perceived legislative omission. *See* Reading Law, pp. 94-97. Rather, Section 922(b)(5) plainly prescribes the FFL's duty: to record the specific identifying information related to the individual person with whom the FFL is dealing. And just as clearly, the statute does not impose upon the FFL any additional duty to determine if the purchaser is acting as an agent for another, or making the purchase for himself.

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[6] If multiple persons visit an FFL's place of business, the FFL would need to know which one of those persons is the transferee so that the FFL can run a proper criminal background check. *See* 18 U.S.C. Section 922(t)(1).

B. 18 U.S.C. Section 923(g)(1)(A) Does Not Authorize the Attorney General to Require an FFL to Determine Whether a Firearms Purchaser is Acting as an Agent for Another Person.

18 U.S.C. Section 923(g)(1)(A) authorizes the Attorney General by regulation to accomplish two firearms record-keeping objectives. First, he is empowered to issue regulations governing the "period" of time that an FFL is obligated to "maintain such records of ... sale or other disposition of firearms at his place of business." Second, he is authorized to adopt regulations governing the "form" in which such records are to be kept. But this section does not, as the Government apparently assumes,[7] authorize the Attorney General to require an FFL to obtain any information for his files in addition to the information specifically required by Section 922(b)(5).

To be sure, Section 926(a) authorizes the Attorney General to "prescribe ... rules and regulations" but, unlike the broad power delegated to some agencies, the authority of the Attorney General is expressly limited to "**only** such rules and regulations **as are necessary** to carry out the provisions of this chapter." (Emphasis added.) Thus, the Attorney General has no authority to add to the records that Section 922(b)(5) requires an FFL to keep, but only such rules and regulations that are objectively necessary to ensure that the "name,

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[7] *See* Opp. Br. at 16-17.

age, and place of residence" of the person physically present at the point of sale or delivery are "kept."

This reading of the Attorney General's limited authority is reinforced by the legislative history of Section 926(a). Prior to the enactment of the Firearm Owners' Protection Act ("FOPA") of 1986, Section 926 conferred upon the Secretary of the Treasury (the predecessor to the Attorney General in the current statutory scheme) the power to "prescribe such rules as he **deems necessary** to carry out the provisions of this chapter." *See* Pub. L. 90-618, 82 Stat. 1226 (1968) (emphasis added). However, FOPA amended this authorization, limiting the Secretary (now Attorney General) to "prescrib[ing] **only** such rules and regulations **as are necessary** to carry out the provisions of this chapter." *See* Pub. L. 99-308, § 926, 100 Stat. 459 (1986) (emphasis added).

Furthermore, before the Attorney General may exercise his authority under Section 926(a), he must "give ... public notice, and ... afford interested parties opportunity for hearing." But no such notice or public hearing was given in connection with the imposition by ATF of its current straw practice doctrine by adding new terminology, a new question, and new instructions to the ATF Form 4473. *See* Brief of Petitioner at 9.

C. 27 C.F.R. § 478.124 Requires an FFL to Keep a Record Identifying the "Transferee," not the "Actual Buyer."

As Abramski has shown, 18 U.S.C. Section 924(a)(1)(A) applies only if a statute — not a

regulation — requires the information to be kept. *See* Pet. Br. at 32-35. But, even if Section 924(a)(1)(A) is construed to apply even to information required by regulation, the Government's argument should be rejected.

The Government contends that:

> The Attorney General has promulgated a **regulation** that requires a [FFL] to record firearms transactions on the ATF Form 4473, 27 C.F.R. 478.124(a), and the form requires the purchaser to certify that he is the "**actual buyer**" as part of the dealer's collection of the name and other identifying information of the purchaser. *See* 27 C.F.R. § 478.124(b). [Opp. Br. at 16 (emphasis added).]

The Government is mistaken. There is nothing in 27 C.F.R. Section 478.124(a) or (b) requiring the ATF Form 4473 to contain any information identifying an "actual buyer" by name, or providing for any other form containing identifying information of an "actual buyer." Indeed, the term "actual buyer" does not even appear in either subsection of the referenced regulation. Instead, the firearm purchaser is consistently referred to as the "transferee," and the identifying information that is required to appear on the Form 4473 is that of "transferee," not "actual buyer," the latter term having been informally invented and inserted into the form by ATF.

Stripped of this unauthorized ATF overlay, 27 C.F.R. Section 478.124(c)(1) requires the FFL to:

> obtain a form 4473 from the **transferee** showing the **transferee's** name, age, residence address[,] date and place of birth; height, weight and race of the **transferee**; the **transferee's** country of citizenship; the **transferee's** INS issued alien number or admission number; the **transferee's** State of residence; and certification by the **transferee** that the transferee is not prohibited by the Act from ... receiving a firearm.... [27 C.F.R. § 478.124(c)(1) (emphasis added).]

Additionally, subsection (c)(2) provides for obtaining the "**transferee's** social security number" which may "help avoid the possibility of the **transferee** being misidentified as a felon or other prohibited person." 27 C.F.R. § 478.124(c)(2) (emphasis added). Finally, subsection (c)(3)(i) provides that "[a]fter the **transferee** has executed the Form 4473, the licensee shall verify the identity of the **transferee** by examination of the identification document (as defined in § 478.11) presented, and shall note on the Form 4473 the type of identification used." 27 C.F.R. § 478.124(c)(3)(i) (emphasis added).

These numerous and repeated references to the firearms purchaser as the "transferee" brings the regulations governing the ATF Form 4473 into

harmony with 18 U.S.C. § 922(t)(1), which provides that an FFL:

> shall not **transfer** a firearm to any other person who is not [an FFL], unless — before the completion of the **transfer** ... the system has not notified the licensee that the receipt of a firearm by **such other person** would violate subsection (g) or (n) of this section; and the **transferor** has verified the identity of the **transferee** by examining a valid identification document (as defined in 1028(d) of this title)[8] of the **transferee** containing a photograph of the **transferee**. [(Emphasis added.)]

Consistent with the language of the Brady Act, as codified in 18 U.S.C. Section 922(t)(1), the Department of Justice regulations governing the National Instant Criminal Background Check System ("NICS"), and the ATF regulations governing the Form 4473, refer to the person to whom a firearm is to be transferred by the FFL as the "**transferee**." *See* 28 C.F.R. Section 25.6(c)(1)(iv)(B) and (C) and 27 C.F.R. Section 478.124(c) (emphasis added.) Moreover, not once does the word "actual" appear as a modifier of "transferee." Nor is the transferee ever referred to as a "buyer." Rather, the several provisions in the Form 4473

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[8] According to 18 U.S.C. Section 1028(d), the term "'identification document' means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State ... which, when completed with information concerning a particular individual, is of the type commonly accepted for the purpose of identification of individuals."

regulation referring to "transferee" are all related to the duty of the FFL to physically identify the "transferee," calling for a process of identification that can only be conducted on the person standing before the FFL.

The word "transferee" is not defined in either 18 U.S.C. Section 921(a) or in the FBI regulations governing NICS. *See* 28 C.F.R. § 25.2. Nor is "transferee" defined in the ATF's regulations addressing the meaning of terms. *See* 27 C.F.R. § 478.11. Since it is not defined, the term "transferee" should be understood according to its "ordinary, contemporary, common meaning." *See* Perrin v. United States, 444 U.S. 37, 42 (1979). Within the context in which it appears in the statutes and regulations, "transferee" is consistently used as an identifier of the person to whom property is physically transferred, without regard to the legal nature of the transfer. Indeed, as 18 U.S.C. Section 922(t)(1)(C) provides, the FFL transferor is commanded to verify the "identity of the transferee," not the identity of the transferee as a buyer to whom the transfer of the firearm creates a legal right or interest. Rather, use of the word "transferee" contemplates that, upon verification of a person's physical identity, the FFL transferor, having received NICS clearance to transfer a firearm, is free to transfer that firearm. And the transferee is free to receive that firearm because NICS has given the "go-ahead" to the transfer.

D. The Cases Relied on By the Government Are Unpersuasive.

As noted above, the Government's brief in opposition to Abramski's petition relied upon the decisions of three courts of appeals — one from the Eleventh Circuit,[9] another from the Third Circuit,[10] and another from the Ninth.[11] According to the Government, each court ruled "that the 'actual buyer' information required by the ATF Form 4473 is information required to be kept in the records of a [FFL] within the meaning of Section 924(a)(1)(A)." Opp. Br. at 16. However, none of the three opinions employed any textual analysis, and consequently, none should be considered authoritative.

Purporting to rely on 18 U.S.C. Sections 922(b)(5) and 922(s)(3), the courts of appeals in Nelson and Soto concluded that both statutes supported the proposition that the "information required [under both statutes] is information about the identity of the **actual buyer**, who supplies the money and intends to possess the firearm, as opposed to that individual's 'straw man' or agent." Nelson, 221 F.3d at 1209. *Accord*, Soto, 539 F.3d at 198-99. Remarkably, neither court arrived at this conclusion after any analysis of the language of

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[9] United States v. Nelson, 221 F.3d 1206 (11th Cir. 2000), *cert. denied*, 531 U.S. 951 (2000).

[10] United States v. Soto, 539 F.3d 191 (3d Cir. 2008), *cert. denied*, 555 U.S. 1116 (2009).

[11] United States v. Johnson, 680 F.3d 1146 (9th Cir. 2012).

either section. As pointed out in Section II.A. *supra*, the language in 18 U.S.C. Section 922(b)(5), requiring identification of the "person" to whom a firearm has been sold or delivered, is satisfied by a record that identifies the human being who receives the firearm. It imposes no duty upon the FFL to determine whether that person is acting on his own behalf or on behalf of another, as presumed by the Nelson and Soto courts.

The two courts' reliance on Section 922(s)(3) is even more problematic. Like Section 922(t)(1) and 27 C.F.R. § 478.124(c), Sections 922(s)(3)(A) and (B) require "the name, address, and date of birth ... of the **transferee** [and] a statement that the **transferee**" is not ineligible to receive a "handgun." (Emphasis added.) As noted above, a person is the "transferee" even if he is acting as an agent for another person and, thus, the information requirements of Section 922(s) are to be met by the person physically receiving the transferred firearm, not some other person.

The courts in both Nelson and Soto finessed these textual issues, baldly asserting that, "[i]f an ineligible buyer could simply use a 'straw man' or agent to obtain a firearm from a [FFL], the statutory scheme would be too easily defeated." *See* Nelson, 221 F.3d at 1209; *accord*, Soto, 539 F.3d at 198. Thus the Nelson court decided "[s]urely Congress could not have intended to allow such easy evasion of a comprehensive scheme." Nelson, 221 F.3d at 1210. However, "[t]he question is ... not what Congress 'would have wanted' but what Congress enacted." *See* Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992). As federal court of appeals Judge Easterbrook has

observed: "[J]udicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be a little more than wild guesses." Frank H. Easterbrook, "Statute Domains," 50 U. CHI. L. REV. 533, 548 (1983).

The Ninth Circuit treatment of the relevant statutory language in Johnson is even more cavalier. Although the court examined the text of Section 924(a)(1)(A) to determine whether it required proof that "'an element of materiality should be read into the language concerning false statements made for the dealer's records,'" it conducted no such inquiry as to whether the language of Section 924(a)(1)(A) dictated that the identity of the "actual buyer" be included in an FFL's records. *Compare* Johnson, 680 F.3d. at 1144-46 *with id.* at 1146-47. Instead, after taking a quick look at Sections 922(b)(5) and 923(g)(1)(A), the court concluded that, because 27 C.F.R. Section 478.124(a) and (b) require the FFL to keep the ATF Form 4473, the record-keeping requirement of Section 924(a)(1)(A) was met. Johnson, 680 F.3d at 1147. Completely missing from the Johnson opinion is any reference whatsoever to 27 C.F.R. Section 478.124(c), which provides that the only identifying information that is required to be kept, even by regulation, is that of the transferee, not the "actual buyer" as it appears on the ATF Form 4473.

II. THE ATF "STRAW PURCHASE" DOCTRINE IS ARBITRARY AND UNWORKABLE.

A. The "Straw Purchase" Doctrine is Arbitrary.

Abramski was not charged with violating 18 U.S.C. Section 922(d), which prohibits ineligible persons from acquiring firearms. *See* Pet. Br. at 1-2. That law was not breached here. Yet the Government argues that the law was violated simply because Abramski used his uncle's money to make the purchase. If Abramski had used his own money to buy the firearm, the Government's concedes that the transfer would have been lawful. Opp. Br. at 6-7. Likewise, had Abramski used his uncle's money, but had the firearm shipped to the second FFL rather than taking possession of it himself, the Government would not have brought this case. Thus, ATF's "straw purchase" theory of the case criminalizes virtually the same behavior that it sanctions — distinguishing the two on the basis of a statement made in response to a question that ATF had no authority to ask — whether Abramski was the "actual buyer." A prosecution based on such a theory is completely arbitrary, defying the plain language of 18 U.S.C. Section 922.

1. Congress Has Failed to Enact the Very "Straw Purchase" Doctrine Which ATF Now Espouses.

Currently, it is not against the law to purchase a firearm with the intent to transfer it to another person. Such a purchase, however, is treated as a

crime by ATF, which considers it a "straw purchase" because of the requirement that a transferee state on the Form 4473 that he is the "actual buyer." Thus, gun control advocates both within Congress and in the broader community claim that "straw purchasers who buy guns for other people are only guilty of paperwork violations under federal law." *See* S. Trumble and L. Hatalsky, "What You Need to Know About the Stop Illegal Trafficking in Firearms Act," p. 1 (Mar. 2013).[12]

In response to this perceived "loophole," and in the aftermath of the Newtown, Connecticut mass shooting that killed 20 children in December 2012, there was a flurry of activity in the United States Senate to respond to the tragedy. Democratic Senators Patrick Leahy (D-VT) and Richard Durbin (D-IL) introduced S. 54 – the "Stop Illegal Trafficking in Firearms Act of 2013." The featured provision of that bill was its section punishing and deterring the "straw purchase" of firearms.[13] As originally drafted, the operative provision stated as follows:

> Any person ... who knowingly purchases any firearm for, on behalf of, or with intent to transfer it to, **any other person** ... shall be fined under this

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[12] http://content.thirdway.org/publications/668/Third_Way_One-Pager_-_What_You_Need_to_Know_about_the_Stop_Illegal_Trafficking_in_Firearms_Act.pdf.

[13] *See* J. Steinhauer, "Senate Panel Approves two Gun Control Bills," *The New York Times* (Mar. 12, 2013). http://www.nytimes.com/2013/03/13/us/politics/senate-panel-likely-to-vote-on-gun-measure.html?_r=0.

> title, imprisoned not more than 20 years or both. [*Id.*, section 3 (emphasis added).]

Excepted from this proposed prohibition was any "firearm that is lawfully purchased by a person ... to be given as a bona fide gift to a recipient who provided no service or tangible thing of value to acquire the firearm...." *Id.* Also excepted was the transfer of a firearm to a "bona fide winner of an organized raffle, contest, or auction...." *Id.* Congress, however, did not pass this bill.

As there would have been no reason for Congress to consider a bill to prohibit something that was already illegal, the Senators supporting this bill could not have considered a "straw purchase" to be an activity currently prohibited by statute. Moreover, evidence that Congress considered but did not enact the "straw purchase" doctrine is compelling confirmation that the "straw purchase" doctrine is "an illegitimate exercise of power by the executive branch of government.

Because Congress decided not to act, the prosecutorial decision here continues to be unfettered by any statute defining what constitutes an unlawful straw purchase. The Government may choose to indict a straw purchaser for violation of two statutes, 18 U.S.C. Section 922(a)(6) or Section 924(a)(1)(A), as it did here, or one but not the other. It may make an exception for "gifts," or it may decline to do so. It may define an excepted "gift" without any Congressional

guidance whatsoever. And it may add to the gift exception without limitation.

The decision to criminalize purchases made for an eligible third party under the "straw purchase" doctrine, while exempting gifts for third parties — without even so much as a regulation — is unquestionably an arbitrary policy decision made by the ATF.

2. The Solicitor General Has Exercised Unfettered Discretion to Define What Constitutes a "Straw Purchase."

The Government in its brief argues that a straw purchase occurs when "a person ... purchases a firearm at the direction of, and for use by, a third party...." Opp. Br. at 7. This is based on the Government's erroneous — or at least arbitrary — assumption that gifts are always "unanticipated or unrequested." Opp Br. at 14. But this contention is fraught with uncertainty, as illustrated by the following scenarios.

1. A man requests that his wife buy him a firearm as a present. Here, the wife's purchase is a "gift," but a gift that was "anticipated and requested." Is it a legitimate gift under the Form 4473's instructions?

2. A man purchases a firearm for his wife, who is eligible to possess firearms, in order for her to learn to shoot, and ultimately

lawfully carry. He uses funds from their joint bank account. They consider the firearm their joint property. To which of them does the firearm belong? Who was the actual buyer? Was it a gift? Was the purchase a straw purchase?

3. A man purchases a firearm as a birthday gift for his wife. His wife, however, is the sole breadwinner, so the money that he used to buy her a gift was her money. On the one hand, she had no knowledge of the gift. On the other hand, her husband used money that technically was hers. Was this a gift, or a "straw purchase"?

4. A father uses his own money and purchases a gift for his felon son, who has no knowledge of the purchase. Under ATF's theory, would the purchase itself (albeit not the subsequent transfer to the son) be legal, since it was a gift, and thus no false statement was made?

5. A son purchases a firearm locally for his eligible father, who lives some distance away in the same state. When the father and son see each other on the holidays, the father pays his son and the son gives his father the firearm. The purchase did not occur at an FFL, but instead the son purchased the firearm "face-to-face" from a private seller. This is the same case as this case, except no "false statement" was made

on a Form 4473, as there is no Form 4473 required for private sales. Would ATF still argue that this was a straw purchase? Or does a different rule apply to purchases at FFLs than applies to purchases from private sellers, the only difference being the checking of a box on a form? How could a statement in one case be material to the lawfulness of the sale, while in the other case that same fact is irrelevant?

3. ATF Has Used Its Unfettered Discretion in Arbitrary Ways.

18 U.S.C. Section 922(b)(1) prohibits anyone under 18 years of age from receiving any firearm, and anyone under 21 years of age from receiving a handgun from an FFL. Additionally, 27 C.F.R. Section 478.124(f) requires that the transferee "show ... in case the firearm to be transferred is a firearm other than a shotgun or rifle, the transferee is 21 years or more of age; in case the firearm to be transferred is a shotgun or rifle, the transferee is 18 years or more of age...."

However, ATF's website sanctions parents or guardians purchasing firearms "as gifts" for minors.[14] This would fit with ATF's "gift exception" on the Form 4473 only if the parent used his own money. However, there is no such condition explained on the ATF website. The U.S. Court of Appeals for the Ninth

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[14] "Firearms - Frequently Asked Questions - Unlicensed Persons," http://www.atf.gov/content/firearms-frequently-asked-questions-unlicensed-persons#parent-purchases.

Circuit assumed that a parent could purchase a firearm for a minor, **even using the minor's money**, and such a transfer would not be a straw purchase. U.S. v. Moore, 109 F.3d 1456 (9th Cir. 1997). Apparently, the ATF had admitted as much at trial. *See* U.S. v. Moore, 84 F.3d 1567, 1571 (9th Cir. 1996) ("At trial, a BATF agent testified that it is not illegal for a parent to buy a gun for a 14-year-old child with the child's own money. The agent testified that in doing so, the parent would be required to list his or her name as the 'transferee (buyer)' on the BATF Form. This would not be a false statement even if the parent intended immediately to turn over the gun to the child.").[15]

This would mean that ATF's "straw purchase" doctrine is as follows: an eligible person may purchase a firearm, **unless** he is buying it for third person, **unless** it is with his own money as a gift for the third person, **unless** that third person is his child, in which case he may use the minor's money, at least in the Ninth Circuit. Such nuanced distinctions have no basis in the law, and are not supported by any regulation. To allow the ATF the authority to make such arbitrary distinctions based on its whim cannot be permitted.

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[15] This panel opinion was overruled on other grounds by the *en banc* court.

B. The "Straw Purchase" Doctrine is Unworkable.

1. The Government Misstates the Role of an FFL in Transferring a Firearm.

In order to justify Abramski's conviction, the Government argues that Section 922(a)(6) should be read to include words that do not appear in the text. The statute prohibits false statements that are "material to the lawfulness of the sale." However, the Government argues that this statute prohibits statements that are material "to **a determination of whether** the sale is lawful." Opp. Br. at 11 (emphasis added). But that is a meaning entirely different from the statute's plain language. And the Government claims that it is the "firearms dealer [who] must ... determine whether a sale is lawful." Opp. Br. at 7. But in enacting federal gun control statutes, Congress never intended to place such a burden on an FFL to determine whether a sale is, in fact, lawful. Moreover, an FFL could never hope to meet such a burden. Rather, "lawfulness" is a determination made by the Government through the NICS check

The Government claims that the FFL "must know the **identity of the would-be-purchaser** to determine whether a sale is lawful." Opp. Br. at 7 (emphasis added). Then the Government goes even further, not only requiring the FFL to determine the identity of some "would-be-purchaser," but also arguing that material facts include "any fact that would help the dealer to **determine the buyer's eligibility**...." Opp. Br. at 8 (emphasis added). But

the FFL is not required by law to inquire or determine the identity of some "would-be-purchaser," much less his eligibility. Instead, before making a transfer, ATF's own regulations only require the "licensee [to] verif[y] the **identity of the transferee** by examining the identification document presented...." 27 C.F.R. § 478.102(a)(3) (emphasis added). *See also* 18 U.S.C. § 922(t)(1)(C).

To protect its conviction, the Government manufactures new duties for an FFL. The FFL is never required , as the Government appears to assert, to: (i) ask the buyer if he is buying the firearm for himself or someone else;[16] then (ii) inquire as to that third person's eligibility; then (iii) ask for details about how the firearm purchase is being financed; and based on all of the above, (iv) somehow reach a **legal conclusion** about whether the sale is lawful.

Indeed, nowhere is the FFL required to certify anything about a third party "would-be-purchaser." The FFL is simply required to determine the identity of the transferee — the person standing in front of him. 27 C.F.R. Section 478.102(a)(3). A person's identity is a simple, **factual question**. An FFL simply needs to examine the transferee's identification to see if he is, in fact, the person he claims to be. On the other hand, the lawfulness of the sale is a nuanced **legal question**. That is the function of NICS in the first instance, and ultimately the courts, to determine.

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[16] For example, the FFL is not required to ask "is the gift recipient eligible to own this firearm?" and a buyer is not required to represent "this firearm is a not gift for someone else."

No FFL could be expected to make such a determination.

2. The FFL's Proper Role is Ministerial, Not to Provide Substantive Legal Judgment.

Contrary to what the Government argues, the FFL's primary role is administrative, and geared towards keeping the proper records of the transaction. All an FFL is required to do is **verify the identity of the person standing in front of him**, and make sure that the appropriate boxes are checked on the Form 4473. *See* 18 U.S.C. § 922(t)(1)(C). It is up to the NICS system to determine the lawfulness of the sale. The Form 4473 reinforces this understanding, where an FFL is required to certify only that:

> On the basis of: (1) the statements in Section A ... (2) my verification of the identification ... and (3) the information in the current State Laws and Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A. [ATF Form 4473, Section D.]

The Government erroneously claims that the FFL must determine that a sale **objectively "is lawful,"** from a **legal** perspective. Opp Br. at 7. But the Form 4473 requires the FFL only to certify his **"belief"** that the sale is **"not unlawful"** based on two **factual**

observations — the completed Form 4473 and the demonstrated identity of the person standing before him.

III. THE ATF STRAW PURCHASE DOCTRINE USURPS LEGISLATIVE POWER.

The Brady Handgun Violence Protection Act, codified by 18 U.S.C. § 922(t), provides that, upon the FFL's verification of the identity of the "transferee" of a firearm, the FFL is free to transfer a firearm to that transferee if, after "3 business days," the "national instant background check system" has "not notified" the FFL "that receipt of a firearm" by such transferee "would violate subsection (g) or (n) of this section." 18 U.S.C. § 922(t)(1)(B) and (C). The FFL's duty to verify is limited to the identity of the transferee and is discharged "by examining a valid identification document of the transferee containing a photograph of the transferee." 18 U.S.C. § 922(t)(1)(C).

The ATF straw purchase doctrine adds to the duty to verify the identity of the transferee physically in the presence of the FFL, a new duty to identify a downstream transferee who is not even in the store — who ATF calls the "actual buyer." A fair reading of the text of Section 922(t)(1)(C) does not accommodate a requirement that the FFL review the identification of an absent third party. By design and in effect, however, ATF's straw purchase doctrine posits the existence of multiple transferees and requires an FFL to verify the identity of **two or more** transferees, in violation of the canon of construction against

"read[ing] an absent word into the statute." Lamie v. United States Trust, 540 U.S. 526, 538 (2004).

In its zeal to prevent an ineligible person from obtaining a firearm, the ATF (and the court of appeals below) have perceived, and then filled in what they have considered to be a "gap in the Brady regulatory apparatus process." *See* J. Jacobs and K. Potter, "Keeping Guns out of the Wrong Hands: The Brady Law and Limits of Regulation," 86 J. OF CRIM. LAW AND CRIMINOLOGY 93, 107 (1995). This so-called "gap" was not the product of a congressional oversight, but of the legislative reality of cobbling a bill that would pass both the Senate and the House of Representatives in the intensely fought battle over gun control on Capitol Hill.[17] *See* R. Aborn, "The Battle Over the Brady Bill and the Future of Gun Control Advocacy," 22 FORDHAM URBAN L. J. 417 (1995). While the ATF and the courts may desire to add to "Congress' chosen words," they must "'defer[] to the supremacy of the Legislature, as well as recognition that Congressman typically vote on the language of a bill.'" Lamie, 540 U.S. at 538 (citations omitted).

As the U.S. District Court for the Northern District of Alabama perceptively observed in United States v. Dollar, 25 Supp. 2d 1320 (N.D. Ala. 1998), the ATF changed the law by modifying the Form 4473. Instead of stating that it was unlawful to transfer a firearm that the transferor knew or had reason to

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[17] This compromise legislation, unlike the ATF straw purchase doctrine, also has the benefit of being workable. *See* Section II.B, *infra*.

believe was a transfer to another person who was ineligible to receive a firearm, the Form 4473 stated the rule to be against any transfer to a third party regardless of eligibility. *See id.* at 1322-25. Such a change in policy is plainly an illegitimate usurpation of legislative power.

There is simply nothing in the Brady Act that requires an FFL to go beyond identifying the transferee of a firearm. Indeed, to require an FFL to go beyond such an identification process would frustrate a key feature of NICS: to serve as a

> national **instant** criminal background check system, that any [FFL] may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied **immediately**, on whether receipt of a firearm by a prospective **transferee** would violate section 922 of Title 18, United States Code, or State law. [Pub. L. 103-159, 107 Stat. 1541 (Nov. 30, 1993), Section 103(b), (emphasis added.)][18]

Thus, in order to obtain clearance to transfer a firearm, the FFL need only convey to NICS: the (i) name; (ii) sex; (iii) race; (iv) complete date of birth;

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[18] According to the FBI, "NICS is a computerized background check system designed to respond within **30 seconds** on most background check inquiries so that the FFLs receive an almost **immediate** response." *Id.* (emphasis added). http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet.

and (v) state of residence of the proposed transferee. 28 C.F.R. § 25.7(a). This accelerated process to provide an instant response system was not accidental, but critical to the enactment of the NICS system. In the years leading up to the passage of the Brady Bill, the major stumbling block for those Senators and Representatives favoring a criminal background check was the delay that would ensue between purchase and possession. *See* R. Aborn, "The Battle Over the Brady Bill," *supra*.

CONCLUSION

Whether out of frustration or presumption, the ATF cannot justify its decision unilaterally to implement its straw purchase doctrine to prohibit firearm transfers involving third parties who are eligible to receive them. Not only has this ATF doctrine encroached upon the legislative powers of Congress, it has corrupted the administrative process, misrepresenting on an official Government form that it is illegal for any person to buy a firearm on behalf of another person eligible to own the firearm. Clearly at odds with the law as it is written, it is time for this Court to put a stop to this lawlessness, vacating Petitioner Abramski's conviction and remanding this case with instructions to dismiss the indictment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-1493

In the Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA, 25 OTHER STATES, AND GUAM IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

When a person buys a firearm from a federally licensed firearm dealer intending to later sell it to someone else, the government often prosecutes the initial buyer under 18 U.S.C. § 922(a)(6) for making a false statement about the identity of the ultimate buyer that is "material to the lawfulness of the sale." These prosecutions rely on the court-created "straw purchaser" doctrine, a legal fiction that treats the ultimate recipient of a firearm as the "actual buyer," and the immediate purchaser as a mere "straw man."

The lower courts uniformly agree that a buyer's intent to resell a firearm to someone who cannot lawfully buy it is a fact "material to the lawfulness of the sale." But the Fourth, Sixth, and Eleventh Circuits have split with the Fifth and Ninth Circuits about whether the same is true when the ultimate recipient can lawfully purchase and possess a firearm. The questions presented are:

1. Is a firearm buyer's intent to sell a firearm to another lawful buyer in the future a fact "material to the lawfulness of the sale" of the firearm under 18 U.S.C. § 922(a)(6)?

2. Is a firearm buyer's intent to sell a firearm to another lawful buyer in the future a piece of information "required . . . to be kept" by a federally licensed firearm dealer under § 924(a)(1)(A)?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici States seek to protect their citizens' freedom to determine how, if at all, to regulate private intrastate firearm transfers between individuals who may lawfully possess firearms. No federal law directly governs those transfers. But the United States's effort in this case to broadly criminalize *all* "straw purchases" of firearms—not just those for prohibited individuals, but also those for individuals who could legally have bought the firearm themselves—is an attempt to impose indirect federal regulation on such transfers. The point of the rule, after all, is to eliminate private intra-state transfers between "straw purchasers" and their ultimate lawful recipients. It will also have an undeniable deterrent effect on private sellers who fear being mistakenly prosecuted. *Amici* States file this brief to highlight the United States's significant executive overreach and to raise critical federalism and Second Amendment concerns.

Amici constitute a majority of the States. *Amici* are the States of West Virginia, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming; the Commonwealths of Kentucky and Virginia; and Guam.

Importantly, this is not a case concerning the possession of firearms by prohibited persons or an attempt to circumvent federal law by transferring firearms to such prohibited persons. This is a case about a lawful private transfer between two individuals legally permitted to possess firearms, each of whom could also have lawfully purchased the firearm in question from a federally licensed dealer (commonly known as a "federal firearms licensee" or an "FFL"). The case is here solely because the United States wishes to ensure that federal records document as often as possible the ultimate possessors of firearms, and has aggressively and erroneously interpreted two statutes to achieve that end. *Amici* States urge this Court to prevent this intrusion on their sovereignty and their citizens' constitutionally guaranteed right to bear arms.

SUMMARY OF ARGUMENT

The United States, through purely executive action, seeks to unlawfully create federal regulation of private intrastate firearms transfers between two individuals who are legally permitted to possess firearms. No federal law directly prohibits or regulates such private transfers. Instead, the States regulate those transactions to the extent their citizens deem necessary and appropriate.

According to the United States, two statutes concerning representations made to federally licensed dealers may be broadly interpreted to prohibit *all* "straw purchases" and therefore indirectly regulate such private intrastate transfers.

But neither reading squares with the plain text of the statutes. To the extent the first statute is concerned with "straw purchases," it clearly distinguishes between cases involving "straw purchases" on behalf of prohibited persons and this case, where the "straw purchase" was for a person legally permitted to possess a firearm. As for the second statute, nothing in its plain language prohibits or relates to "straw purchases."

What is more, the United States's interpretations would fundamentally expand the scope of federal firearm regulation and registration. The prohibition is intended, of course, to eliminate private intrastate transfers between "straw purchasers" and their ultimate lawful recipients. But it would have a farther reaching effect still, including deterring the common practice of purchasing firearms as gifts. The logic that the United States advances to forbid "straw purchases" for individuals legally permitted to possess firearms should, if fairly applied, also forbid the purchase of firearms from a federally licensed dealer to give as gifts. And although the United States claims today that it will not prosecute the purchase of firearms as gifts, prudent individuals will recognize that there is no logical distinction and refrain from doing so.

The United States's approach also displaces the States from deciding whether and how to regulate the private intrastate transfer of firearms. In the absence of a federal statute and in response to their citizens' preferences, the States have enacted a

variety of different regimes relating to the private intra-state transfer of firearms. The United States threatens to usurp these state legislative decisions by federal executive fiat.

Finally, the United States's position unnecessarily brings the Second Amendment into this case because it limits the ability of individuals between 18 and 21 years of age to obtain a handgun. Under federal law and in many States, 18- to 20-year-old adults can lawfully possess firearms. But federally licensed firearms dealers are prohibited by statute from selling them handguns. To lawfully obtain a handgun, an 18- to 20-year-old individual in these jurisdictions must either acquire it through a private intrastate sale or receive it as a gift. Because the United States's position in this case will deter such private sales and gifts, it will reduce the already limited means by which these 18- to 20-year-olds can lawfully obtain a handgun. To adopt the United States's view, this Court would have to decide for the first time whether such a further restriction on the access of 18- to 20-year-old adults to handguns implicates the Second Amendment and, if so, whether it survives constitutional scrutiny. Rather than wading into this contested area of law, this Court should adopt *amici* States' reading of the statutes, which does not raise any potential constitutional questions.

ARGUMENT

Unlike those who intentionally transfer firearms to prohibited persons, individuals in the same State who may legally possess firearms have any number of legitimate reasons to transfer firearms to each other. They might do so for convenience (a person already at or going to the store might also purchase a firearm for the other), to save money (one individual might get a discount at the store because, for example, he or she is a current or former member of law enforcement, as was true here), out of necessity (individuals between 18 and 21 years of age cannot purchase a firearm from a federally licensed firearms dealer even though they often may legally possess one), or because of changed circumstances or preferences (one person may simply have no further desire to keep a firearm that another person would be happy to have).

In the absence of a federal statute and reflecting their citizens' varying preferences, the States have adopted different approaches to these private intrastate firearm transfers between individuals who are legally permitted to possess firearms. For example, West Virginia does not regulate such transfers, while Colorado requires the transferee undergo and pass a background check coordinated through a licensed firearms dealer.

The United States, however, has convinced the Fourth Circuit (and several other courts) that it should be allowed to regulate those transfers indirectly, even though there is no federal law that

directly does so. Interpreting several federal statutes exceedingly broadly, the United States seeks to treat those who transfer firearms to prohibited persons the same as those who transfer firearms to non-prohibited persons. As explained more fully below, this is unlawful and raises federalism and potential constitutional concerns.

I. The United States Wrongly Interprets Federal Law To Indirectly Regulate The Private Intrastate Transfer Of Firearms Between Two Individuals Legally Permitted To Possess Firearms.

No federal law directly regulates the private intrastate transfer of firearms between two individuals who are legally permitted to possess firearms. Congress has banned interstate private firearm transfers, the sale by federally license dealers of any firearm to a minor and handguns to young adults, and the possession of firearms by certain categories of individuals, including convicted felons, fugitives from justice, users of illegal drugs, and mental incompetents. 18 U.S.C. §§ 922 (a)(3), (b)(1), (c)(1), (d). But there is no direct federal regulation of private intrastate transfers between non-prohibited individuals. *See* U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, Firearms-Frequently Asked Questions-Unlicensed Persons, http://www.atf.gov/content/firearms-frequently-asked-questions-unlicensed-persons (ATF FAQ) ("A person may sell a firearm to an unlicensed resident of his State, if he does not know or have

reasonable cause to believe the person is prohibited from receiving or possessing firearms under Federal law. . . . When a transaction takes place between private (unlicensed) persons who reside in the same State, the Gun Control Act (GCA) does not require any record keeping.").

Nevertheless, the United States contends that two federal statutes concerning representations made to federally licensed dealers may be broadly interpreted to indirectly restrict such private intrastate transfers. Neither reading, however, comports with the plain text of the statutes. Moreover, the far-reaching consequences of the United States's interpretations show that they cannot be consistent with Congress's intent. As this Court has cautioned, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

A. The first federal law is 18 U.S.C. § 922(a)(6), which the United States has used in other cases to prosecute individuals acting as "straw purchasers" for persons *prohibited* under federal from possessing a firearm. The statute makes it unlawful for a person buying a firearm from a federally licensed firearms dealer "knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive" the dealer "with respect to any fact material to the lawfulness of the sale." 18 U.S.C. § 922(a)(6). The United States has argued in other

cases, and courts have agreed, that a "straw purchaser" for a prohibited person knowingly makes a material false statement about the buyer's identity when he claims on ATF Form 4473 that he is the "actual buyer" of the firearm. *See, e.g.*, *United States v. Moore*, 109 F.3d 1456, 1460-61 (9th Cir. 1997) (en banc).

This case involves a "straw purchase" for a *non*-prohibited person—*i.e.*, a person legally permitted to purchase and possess a firearm—but the United States urges that the statute be broadly read to apply as it would in the case of a purchase for a prohibited person. That expansive reading is inconsistent, however, with the statute's plain text. Section 922(a)(6) forbids only knowing false statements "intended or likely to deceive" a licensed firearms dealer "with respect to any fact *material* to the *lawfulness* of the sale." 18 U.S.C. § 922(a)(6) (emphases added). That last qualification is quite significant. It distinguishes between the case where a "straw purchaser" fails to disclose an ultimate recipient who *cannot* lawfully possess a firearm and this case, where the ultimate recipient *can* lawfully purchase and possess a firearm. In the former case, the failure to disclose the ultimate recipient's identity is arguably "material" to the "lawfulness" of the sale, because that individual could not himself lawfully purchase and possess the firearm. But in this case, the failure to disclose is plainly immaterial to the "lawfulness" of the sale, since the original sale would be lawful even if the ultimate recipient had

gone to the dealer himself. *See United States v. Polk*, 118 F.3d 286, 295 (5th Cir. 1997).

The importance of the "lawfulness" requirement is reflected in the statute's statement of purpose and legislative history. "[I]t is not the purpose of this title," the Act states, "to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms." Gun Control Act of 1968, Pub. L. 90–618, § 101, 82 Stat. 1213, 1213-1214. Furthermore, the Act was expressly "not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for *lawful purposes*." *Ibid.* (emphasis added). Rather, the statute's "broadly stated principal purpose was 'to make it possible to keep firearms out of the hands of those *not legally entitled to possess them* because of age, criminal background, or incompetency.'" *Barrett v. United States*, 423 U.S. 212, 220 (1976) (quoting S. Rep. No. 90-1501, at 22 (1968)) (emphasis added).

The United States effectively reads the "lawfulness" element out of the statute's materiality requirement. It would punish a "straw purchaser's" failure to disclose the ultimate recipient's identity *regardless* of whether that identity *actually affects* the lawfulness of the purchase. In its view, the statute forbids an individual from knowingly making false statements about any facts that *could affect* a sale. But if that were Congress's intent, the statute could simply have prohibited any knowing false

statement "with respect to any fact material to . . . the sale." The addition of the "lawfulness" element must have independent meaning. The United States's approach violates the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

Significantly, the United States's interpretation would criminalize a variety of harmless statements. Consider, for example, a 55-year-old buyer who is legally permitted to possess firearms, but who represented her age as 50. The buyer's age is not material to the *lawfulness* of the sale, because the sale would be lawful whether her age was 50 or 55. But under the United States's reading of the statute, this entirely harmless statement would be criminally punishable because the age of an individual could theoretically affect the sale. That result cannot be squared with Congress's clear desire "not . . . to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms." § 101, 82 Stat. at 1213-1214.

B. The second federal law is 18 U.S.C. § 924(a)(1)(A), which similarly criminalizes certain knowing false statements to federally licensed firearms dealers. Specifically, the statute subjects to criminal penalty any person who "knowingly makes

any false statement or representation with respect to the information required *by this chapter* to be kept in the records of" a federally licensed firearms dealer. 18 U.S.C. § 924(a)(1)(A) (emphasis added). A federally licensed dealer is required to record the "name, age, and place of residence" of every individual to whom the dealer sells a firearm. *Id.* § 922(b)(5) (making it unlawful for a licensed dealer "to sell or deliver . . . any firearm or armor-piercing ammunition to any person unless the licensee notes in his records . . . the name, age, and place of residence of such person").

The United States reads this statute to forbid a "straw purchaser" from representing on ATF Form 4473 that he is the "actual buyer" of the firearm. But again, the United States's interpretation is inconsistent with the plain text. The statute prohibits knowing false statements about information that a federally licensed dealer is required *by statute* to record. The statute requires a dealer only to record the "name" of "such person" to whom a dealer "sell[s] or deliver[s]" a firearm. *Ibid.* Here, that person was Bruce Abramski. The statute nowhere requires a dealer to record the person's answer to the "actual buyer" question on ATF Form 4473 or make any notation whatsoever relating to whether the person might be a "straw purchaser." Where a statute's text is "plain and unambiguous," it must be applied "according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

C. The United States's interpretations of these statutes not only contravene the laws' plain text, but also must be wrong because they would fundamentally expand the scope of federal firearms regulation and registration. No federal law directly regulates private intrastate firearm sales or gifts. As interpreted by the United States, however, these statutes would significantly affect both.

First, as a practical matter, a rule that forbids "straw purchases" for individuals legally permitted to possess firearms would dramatically decrease private intrastate sales. The prohibition is intended, of course, to eliminate all sales between such "straw purchasers" and their subsequent lawful buyers. But it would also have a wide-reaching deterrent effect.

Some individuals who currently own firearms, or who purchase firearms in the future for themselves, would be hesitant to privately resell those firearms. Unless beyond the statute of limitations, every such sale could be Exhibit 1 in a federal prosecution for an unlawful "straw purchase." And though the government would still have to prove the individual's requisite intent at the time of purchase, the mere risk of being charged with a crime—no matter how meritless the charge—would, for some, outweigh whatever financial gain might come from selling the used firearm. Moreover, the reality is that many firearm buyers have, at the time of purchase, some thought that they might one day sell their firearms for profit or simply to obtain funds to purchase

something new. Those individuals might have a heightened belief—rightly or wrongly—that actually reselling their firearms privately would put them at risk of prosecution.

Second, the United States's position would curtail the common practice of purchasing firearms as gifts. The logic that the United States advances to forbid "straw purchases" for individuals legally permitted to possess firearms should, if fairly applied, also forbid the purchase of firearms from federally licensed dealers as gifts. If it is unlawful to claim to be the "actual buyer" when purchasing a firearm to sell to another lawful individual, it should also be unlawful to do so when buying one to give to another lawful individual. In either case, the buyer has falsely represented the identity of the recipient of the sale. Although the United States claims today that it will not prosecute the purchase of firearms as gifts, prudent individuals will recognize that there is no logical distinction and act accordingly. The "gift exemption" is a fiction created by ATF Form 4473 and could easily be revoked at the whim of the agency.

In short, the United States suggests an interpretation of these statutes that would significantly impair private intrastate transfers of firearms, transfers that Congress has never shown any intent to prohibit. Motivated by a desire to avoid prosecution for a "straw purchase," individuals who want to transfer a firearm in-state will go through federally-licensed firearms dealers rather than doing

so privately. Each such transfer will require a background check, with attendant cost to the person, and generate federal records, expanding the scope of federal firearms regulation and registration.

But as this Court has said before, "[t]he idea that Congress gave the [Executive] such broad and unusual authority through an implicit delegation . . . is not sustainable." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). If Congress wanted to discourage or prohibit private intrastate firearm sales, it could have said so. It did not, and this Court should not permit the Executive to do so unilaterally.

II. The United States's Expansive View Of The Statutes At Issue Unlawfully Infringes On The States' Ability To Be Responsive To Their Citizens' Preferences.

By unlawfully expanding federal law beyond Congress's intent, the United States also displaces the States from deciding whether and how to regulate the private intrastate transfer of firearms. In the absence of actual federal regulation and in response to their citizens' preferences, the States have enacted a variety of different regimes relating to the private intrastate transfer of firearms. *See, e.g.*, ATF FAQ (concluding that no federal statutes govern private firearm sales and noting "[t]here may be State or local laws or regulations that govern this type of transaction."). Some states, like California and New York, stringently regulate the private market for firearms with laws that require universal background checks or firearm owner identification

cards.[1] But many states, including West Virginia, are either silent or have few laws regulating private intrastate firearm transfers beyond proscriptions on transferring a firearm to a prohibited person.[2]

In fact, the States have specifically shown that they can and will directly regulate "straw purchases" when that suits their citizens. Many states do not prohibit "straw purchases," but at least one has set forth a particularized regime targeting such actions. Under Maryland law, a "straw purchase" is defined as "a sale of a regulated firearm in which a person uses another, known as the straw purchaser, to: (1) complete the application to purchase a regulated firearm; (2) take initial possession of the regulated firearm; and (3) subsequently transfer the regulated firearm to the person." Md. Code Ann., Pub. Safety § 5-101. But in contrast to the United States's position, Maryland forbids only the "knowing participa[tion] in a straw purchase of a regulated firearm *to a minor or to a person prohibited by law from possessing a regulated firearm*." *Id.* § 5-141(a) (emphasis added); *see also* 93 Md. Op. Att'y Gen. 126

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[1] *E.g.*, Colo. Rev. Stat. § 18-12-112; Cal. Penal Code § 28050; N.Y. Gen. Bus. § 898; N.J. Stat. Ann. § 2C:58-3.

[2] *E.g.*, Ala. Code §§ 13a-11-3, *et seq.*, 13A-11-57, 13A-11-72, 13A-11-76; Ark. Code Ann. §§ 5-73-101, *et seq.*, 5-73-132; Ga. Code Ann. §§ 16-11-131, 16-11-132, 16-11-172; Idaho Code Ann. §§ 18-3302A, 18-3302F, 18-3308, 18-3316; Kan. Stat. Ann. § 21-6303; Ky. Rev. Stat. Ann. § 237.070; La. Rev. Stat. Ann. § 14:95.1.1; Minn. Stat. § 624.7141; Mont. Code Ann. § 45-8-313; Neb. Rev. Stat. § 28-1211; Nev. Rev. Stat. § 202.254; W. Va. Code §§ 61-7-1, *et seq.*, 61-7-10.

(2008) ("In general, a 'straw purchase' occurs when the apparent buyer illegally acquires a firearm on behalf of a person who is prohibited by law from acquiring, owning, or possessing a firearm."). The United States threatens to overrun this and all the other state legislative decisions by federal executive fiat.

As Congress implicitly recognized by regulating only *interstate* private firearms sales, state-based decision-making in this area makes sense and is consistent with this nation's foundational commitment to federalism. Attitudes toward firearm ownership and lawful use vary significantly from state to state. *See, e.g.*, Colin Woodward, *Up in Arms*, Tufts Magazine, Fall 2013, *available at* http://www.tufts.edu/alumni/magazine/fall2013/features/up-in-arms.html. These differences are reflected, in a way, by the varying degrees that state constitutions protect the right to bear arms. *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191 (2006). In West Virginia, for example, a person has the constitutional "right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use." W. Va. Const., art. III, § 22. In Connecticut, "[e]very citizen has a right to bear arms in defense of himself and the state." Conn. Const., art. 1, § 15. And in California, the state constitution includes no express right to bear arms. State-by-state flexibility allows the States to be responsive to their own citizenry and to "perform their role as laboratories for experimentation," to the

extent consistent with the Second Amendment, of course. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

III. The United States's Expansive View Of The Statutes At Issue Needlessly Brings the Second Amendment Into This Case.

The United States's position also unnecessarily brings the Second Amendment into this case because it limits the ability of individuals between 18 and 21 years of age to obtain a handgun. U.S. Const. amend. II. Under federal law and in many States,[3] 18- to 20-year-old adults can lawfully possess firearms. But because federally licensed firearms dealers are prohibited by statute from selling them handguns, *see* 18 U.S.C. § 922(b)(1), (c)(1), an 18- to 20-year-old individual in these jurisdictions can

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[3] *E.g.*, Ala. Code § 13A-11-76; Alaska Stat. § 11.61.210; Ariz. Rev. Stat. Ann. § 13-3109; Ark. Code Ann. §§ 5-73-109, -119; Colo. Rev. Stat. § 18-12-108.7; Fla. Stat. § 790.17; Ga. Code Ann. § 16-11-101.1; Idaho Code Ann. § 18-3302A; Ind. Code § 35-47-2-7; Kan. Stat. Ann. § 21-6301; La. Rev. Stat. Ann. § 14:91; Me. Rev. Stat. tit. 17-A, § 554-B; Minn. Stat. § 609.66; Miss. Code Ann. § 97-37-13; Mo. Rev. Stat. § 571.060; Mont. Code Ann. § 45-8-321; Neb. Rev. Stat. § 28-1204.01; Nev. Rev. Stat. § 202.310; N.H. Rev. Stat. Ann. § 159:12; N.C. Gen. Stat. § 14-315; N.D. Cent. Code § 62.1-03-02; Okla. Stat. tit. 21, § 1273; Or. Rev. Stat. § 166.470; Pa. Cons. Stat. Ann. § 6302; S.C. Code Ann. § 16-23-30(A)(3); S.D. Codified Laws § 23-7-46; Tenn. Code Ann § 39-17-1303; Tex. Penal Code Ann. § 46.06(a)(2); Utah Code Ann. § 76-10-509.9; Vt. Stat. Ann. tit. 13, § 4007; Va. Code Ann. § 18.2-309; Wash. Rev. Code §§ 9.41.040, 9.41.080; Wisc. Stat. § 948.60(2)(b); W. Va. Code §§ 61-7-7, -8.

lawfully obtain a handgun only through a private intrastate sale or as a gift. The United States's position in this case will further restrict those remaining means of access. As discussed earlier, the statutory interpretation advanced by the United States would dramatically curtail the private intrastate transfer of firearms, whether by sale or gift. *See supra* I.C.

To adopt the United States's view, this Court would have to resolve the debate over whether such a limitation on access implicates the Second Amendment. Though some States permit 18- to 20-year-old adults to lawfully possess handguns, others do not. And in the past year, the full Fifth Circuit Court of Appeals divided deeply over the question. After a panel of the court upheld the statutory prohibition on handgun sales by federally licensed dealers to 18- to 20-year-olds, *see Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 203 (5th Cir. 2012), seven judges dissented from the denial of rehearing en banc, asserting that "18- to 20-year-olds ha[ve] full Second Amendment rights," *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 714 F.3d 334, 339 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc).

These constitutional concerns further bolster the straightforward reading of the laws offered by *amici* States. As this Court has said, "[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court

will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984)). In contrast to the United States, *amici* States offer plausible interpretations of the federal false statement and recordkeeping statutes that raise no Second Amendment questions. This Court should adhere to its "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues [where] a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989).

CONCLUSION

The judgment of the court of appeals should be reversed.

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